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## Expert Witness Testimony in Legal Malpractice Cases

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## EXPERT WITNESS TESTIMONY IN LEGAL MALPRACTICE CASES

WILBURN BREWER, JR.\*

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## I. INTRODUCTION

The number of legal malpractice cases has increased dramatically in the last two decades.<sup>1</sup> A review of the number of such cases reported in regional or state digests for most areas of this country reveals that there probably are more reported cases of legal malpractice in the last twenty years than in all of such cases recorded prior to that time.

Although the subject of expert testimony in professional liability cases has been evolving for some time and is fairly well developed in some areas, such as medical malpractice, only in recent years has it received significant attention in legal malpractice cases. In many of the earlier malpractice cases, the concept of attorney liability was decided without reference to expert testimony. However, recently expert testimony is usually examined at length, and questions regarding the necessity and scope of such testimony have become pivotal points upon which decisions turn.

Professional liability cases generally involve the question of whether the professional failed to perform to an acceptable level of competence in some generally recognized and accepted practice in the particular profession.<sup>2</sup> Because the professional's conduct is measured against a standard of care followed by others in the particular profession,<sup>3</sup> it stands to reason that lay persons would not be able to determine those standards or measure the professional's conduct against them without the assistance of expert testimony from one in the same profession. With this generality in mind, the question arises whether legal malpractice cases are somehow different from other types of professional malpractice cases thus requiring different rules of liability — the short answer is "yes."

Legal malpractice cases are different from other professional liability cases for several reasons. First, in legal malpractice cases, four of the six

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1. See WILLIAM H. GATES & SHEREE L. SWETIN, ABA STANDING COMM. ON LAW. PROF. LIABILITY, CHARACTERISTICS OF LEGAL MALPRACTICE: REPORT OF THE NATIONAL LEGAL MALPRACTICE DATA CENTER (1989) (discussing the latest legal malpractice statistics from the American Bar Association).

2. *Doe v. American Red Cross Blood Servs.*, 297 S.C. 430, 435, 377 S.E.2d 323, 326 (1989) (per curiam).

3. *Id.*

main actors are lawyers: the plaintiff's attorney, the defense attorney, the defendant, and the trial judge. The only nonlawyers directly concerned with the malpractice question are the plaintiff and the jury. Therefore, the lawyers and judge often have some understanding of the malpractice issues and some impression of how to explain those issues to the jury through either arguments or instructions. As will be seen, this type of thinking has influenced a number of decisions regarding the necessity of expert testimony.

A second significant difference between legal malpractice and other types of professional liability cases is that the manner in which lawyers conduct their practices is guided to some degree by their knowledge and understanding of the law. It sometimes becomes difficult to distinguish between questions of law and questions of fact, because questions that pertain to the lawyer's conduct necessarily contain both factual elements and elements regarding the lawyer's understanding of the law. Because of this mixture, substantial confusion arises regarding the proper subject and scope of expert testimony.<sup>4</sup>

A third unique feature in legal malpractice cases is the concept of the "case-within-a-case" as an element of proximate cause. The case-within-a-case concept, as it relates to expert testimony, is the subject of some controversy and is also discussed below.

The unique features that differentiate the handling of expert witness testimony in legal malpractice cases from other professional malpractice cases raise problems that can be avoided or dealt with before they actually become problematic. This article attempts to provide the practitioner with some guidance in the use of expert testimony in legal malpractice cases. It discusses both the general rules governing expert witness testimony in legal malpractice cases and the areas that appear to be unique and difficult to resolve. In some sections, the reader will find more questions than answers; however, awareness of problem areas provides the practitioner with an opportunity to address those problems before they adversely affect the outcome of their client's cases.

## II. THE ELEMENTS OF A LEGAL MALPRACTICE CLAIM AND THEIR RELATIONSHIP TO EXPERT WITNESS TESTIMONY

The relationship between expert witness testimony and the elements of a legal malpractice claim raise multiple issues that go beyond those raised in other professional malpractice cases. The four elements of a legal malpractice claim are:

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4. See Thomas E. Baker, *The Impropriety of Expert Witness Testimony on the Law*, 40 KAN. L. REV. 325 (1992); Charles W. Ehrhardt, *The Conflict Concerning Expert Witnesses and Legal Conclusions*, 92 W. VA. L. REV. 645 (1990); Charles M. Leibson, *Legal Malpractice Cases: Special Problems in Identifying Issues of Law and Fact and in the Use of Expert Testimony*, 75 KY. L.J. 1 (1986-87); Note, *Expert Legal Testimony*, 97 HARV. L. REV. 797 (1984).

1. the existence of an attorney-client relationship;
2. the attorney's breach of a duty through an act or omission;
3. damage to the client; and
4. a proximate cause relationship between the breach of duty and the damages.<sup>5</sup>

Because the attorney-client relationship is not usually addressed by the expert,<sup>6</sup> the first element requiring expert testimony is the standard of care and its breach. The issue of breach of a duty involves questions of both law and fact and is the most frequent subject of expert testimony. The duties owed by the attorney to a client may arise out of the employment contract, but most often are implied by operation of law. The implied duty requires that attorneys perform to a standard of care that protects the client from harm caused by the attorney's actions. Attorneys are required to use their best judgment and to utilize reasonable and ordinary care and diligence in both the exercise of professional skill and the application of professional knowledge.<sup>7</sup> Expert testimony is used to define the standard of care to which attorneys must conform by explaining how attorneys conduct their affairs under given circumstances. In some cases, the expert may also testify about the attorney's breach of duty by offering an opinion that the conduct of the attorney deviated from the standard of care. Modern cases generally agree that the question of the standard of care and its breach are proper subjects of expert testimony.<sup>8</sup>

Substantial controversy exists concerning the use of expert testimony in questions of proximate cause and damages in legal malpractice cases. In a legal malpractice case, the client initially came to the lawyer because the client had a legal problem. Thus, if the lawyer breached some duty to the client, the issue is whether the breach harmed the client by negatively impacting the

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5. *Maryland Casualty Co. v. Price*, 231 F. 397, 401 (4th Cir. 1916); *Cianbro Corp. v. Jeffcoat & Martin*, 804 F. Supp. 784, 789 (D.S.C. 1992) (citing *South Carolina State Ports Auth. v. Booz-Allen & Hamilton, Inc.*, 289 S.C. 373, 376, 346 S.E.2d 324, 325 (1986) and *Shealy v. Walters*, 273 S.C. 330, 335, 256 S.E.2d 739, 742 (1979) (per curiam)), *aff'd*, 10 F.3d 806 (4th Cir. 1993) (mem.); *Klem v. Greenwood*, 450 N.W.2d 738, 743 (N.D. 1990) (citing *Wastvedt v. Vaaler*, 430 N.W.2d 561 (N.D. 1988)); *Nelson v. Taoka*, 611 N.E.2d 462, 465 (Ohio Ct. App. 1992) (citing *Belfer v. Spiegel*, 480 N.E.2d 825, 826 (Ohio Ct. App. 1984)); *Davis v. Vesely*, 707 P.2d 627, 628 (Or. Ct. App. 1985) (citing *Harding v. Bell*, 508 P.2d 216 (Or. 1973)); 1 RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* § 8.1, at 401 (3d ed. 1989 & Supp. 1993) [hereinafter *MALLIN & SMITH*].

6. The existence of an attorney-client relationship is usually considered an issue of fact not requiring expert testimony, 2 *MALLIN & SMITH*, *supra* note 5, § 27.10, at 652, and therefore is not discussed in this article. Additionally, the limited class of cases in which non-clients may sue lawyers is beyond the scope of this article.

7. *Cianbro Corp. v. Jeffcoat & Martin*, 804 F. Supp. at 790 (quoting *Norris v. Alexander*, 246 S.C. 14, 18, 142 S.E.2d 214, 217 (1965) (per curiam)).

8. See 2 *MALLIN & SMITH*, *supra* note 5, § 27.16, at 676-81.

resolution of the client's legal problem. However, if the result would have been the same regardless of what the lawyer did or did not do, no causal relationship exists between the breach of duty and the detriment suffered by the client.

The case-within-a-case concept is often employed to explain the causal relationship between the attorney's breach of a duty and the harm suffered by the client. This concept is best illustrated using examples. For instance, if the client employs a lawyer to defend a case and the lawyer allows the case to go into default, arguably no harm occurred if the client had no available defense anyway and the judgment was justly entered.<sup>9</sup>

Another example is when an attorney is hired to represent an injured party in an automobile accident and, through neglect, the attorney allows the statute of limitations to run on the claim. Traditionally, the client would have to prove proximate cause and damages in this type of case by trying the automobile accident case within the legal malpractice case. Based upon evidence pertaining to the accident and the injuries, the jury then determines the causal relationship between the attorney's neglect and its impact on the client's accident case. If the client did not have a viable claim or suffered no injuries in the automobile accident, the client arguably has not been harmed by the attorney's neglect. Note that this approach to proximate cause and damages may not require expert testimony because juries routinely decide automobile accident cases without expert assistance.

On the other hand, an expired statute of limitations in an automobile accident case may raise further expert testimony issues regarding causation. Should the court permit an attorney experienced in automobile accident cases to testify about the settlement value of the case and bypass actually trying the auto accident case within the legal malpractice case? Reaching even further, should the court permit the expert to opine about the likely outcome of the auto accident case if it had been tried? These are the types of problems encountered when the expert ventures beyond the standard of care question.

Although generally necessary for proving the elements of standard of care and its breach, expert testimony in legal malpractice cases raises novel and difficult questions, especially in regard to the element of causation and damages. The issues concerning the role of expert testimony impact many aspects including the admissibility, necessity, scope, and sufficiency of such testimony.

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9. *E.g.*, *Maryland Casualty Co. v. Price*, 231 F. 397, 402 (4th Cir. 1916). The burdens set out in *Price* have been widely followed in the United States. 2 ROBERT R. HUME, *THE DEFENSE RESEARCH INST., INC., PROFESSIONAL LIABILITY: LIABILITY OF ATTORNEYS* 43 (Donald J. Hirsh & Stephen L. Liebo eds., 1975).

## III. ADMISSIBILITY OF EXPERT TESTIMONY

## A. General Rule

The modern trend of the law, as reflected in Rule 702 of the Federal Rules of Evidence and Rule 43 of the South Carolina Rules of Civil Procedure, is to allow expert testimony from a qualified witness where scientific, technical, or specialized knowledge will assist the trier of fact in understanding the evidence or in determining the facts in issue.<sup>10</sup> However, expert witness testimony in legal malpractice cases requires an additional element of proof. In addition to meeting the general requirement that the testimony must assist the trier of fact, expert witness testimony in legal malpractice cases must also tend to support or refute an element of legal malpractice.

The expert's testimony must meet both of these requirements when offered in regard to the standard of care and its breach. The standard of care in malpractice cases is based upon the skill and care ordinarily exercised by the professional. This information is rarely within the common knowledge of lay persons, and without expert testimony, the jury would be left to speculate about how a reasonably prudent lawyer would have acted under similar circumstances. The Seventh Circuit Court of Appeals stated:

It is not discernible how a jury, without evidence, could determine what constitutes ordinary legal knowledge and skill common to members of the legal profession. Without expert testimony, it was left to a jury of laymen to determine the reasonable care and diligence which lawyers usually exercise when confronted with the same or a similar situation.<sup>11</sup>

Because of the evidentiary requirement to prove the standard of care, every jurisdiction that has addressed the question has held that expert testimony is indeed admissible in legal malpractice cases.<sup>12</sup>

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10. FED. R. EVID. 702; S.C. R. CIV. P. 43(m) (Supp. 1993).

11. *Dorf v. Relles*, 355 F.2d 488, 492 (7th Cir. 1966).

12. See 2 MALLIN & SMITH, *supra* note 5, § 27.15, at 665; Michael P. Ambrosio & Denis F. McLaughlin, *The Use of Expert Witnesses in Establishing Liability in Legal Malpractice Cases*, 61 TEMP. L. REV. 1351 (1988); H. Paul Breslin & Joseph P. McMonigle, *Expert Testimony in Legal Malpractice Actions*, LITIG., Fall 1979, at 30; Louis M. Brown & Ruth C. Tachna, *Dealing with the Lawyer as Expert Witness*, PRAC. LAW., Oct. 15, 1985, at 11; Francis M. Hanna & William C. Ruggiero, *Legal Malpractice Litigation in Missouri*, J. MO. B., March 1992, at 97; Note, *Expert Legal Testimony*, 97 HARV. L. REV. 797 (1984); Dwain E. Fagerlund, Note, *Legal Malpractice: The Locality Rule and Other Limitations of the Standard of Care: Should Rural and Metropolitan Lawyers be Held to the Same Standard of Care?*, 64 N.D. L. REV. 661 (1988); Les Jones, Note, *Evidence—Cleckner v. Dale: Admissibility of Expert Testimony on Standard of Care in Legal Malpractice Cases*, 18 MEM. ST. U. L. REV. 555 (1988); Michael A. DiSabatino, Annotation, *Admissibility and Necessity of Expert Evidence as*

### B. The Necessity of Expert Testimony

The general rule in legal malpractice cases is that expert testimony is ordinarily required to establish a prima facie case.<sup>13</sup> Indeed, it may even be malpractice to attempt to litigate a legal malpractice case without expert testimony. As the court stated in *Brizak v. Needle*,<sup>14</sup> “[A] plaintiff’s attorney who litigates a legal malpractice claim without the opinion testimony of a legal expert unnecessarily exposes his client to a serious risk of dismissal.”<sup>15</sup> Further, the plaintiff’s failure to develop expert testimony prior to trial has resulted in summary judgment in a number of cases.<sup>16</sup>

The fact that an attorney may have made a mistake does not necessarily establish that the attorney deviated from the standard of care.<sup>17</sup> As the court in *Colucci v. Rosen, Goldberg, Slavet, Levenson & Wekstein*<sup>18</sup> stated, “Some allowance must always be made for the imperfection of human judgment.”<sup>19</sup> Also, proof of a bad result is not sufficient to support a malpractice claim without further proof of a deviation from the applicable standard of care.<sup>20</sup>

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to *Standards of Practice and Negligence in Malpractice Action Against Attorney*, 14 A.L.R. 4TH 170 (1982 & Supp. 1993).

13. See, e.g., *Cianbro Corp. v. Jeffcoat & Martin*, 804 F. Supp. 784, 790-91 (D.S.C. 1992) (citing *Mali v. Odom*, 295 S.C. 78, 80, 367 S.E.2d 166, 168 (Ct. App. 1988) and quoting *Pederson v. Gould*, 288 S.C. 141, 143, 341 S.E.2d 633, 634 (1986)), *aff’d*, 10 F.3d 806 (4th Cir. 1993) (mem.); *Boigegrain v. Gilbert*, 784 P.2d 849, 850 (Colo. Ct. App. 1989) (citing *Berman v. Rubin*, 227 S.E.2d 802 (Ga. Ct. App. 1976)); *Pearl v. Nelson*, 534 A.2d 1257, 1259 (Conn. App. Ct. 1988); *Hamilton v. Needham*, 519 A.2d 172, 174 (D.C. 1986) (quoting *O’Neil v. Bergan*, 452 A.2d 337, 341 (D.C. 1982)); *Rose v. Rollins*, 306 S.E.2d 724, 725 (Ga. Ct. App. 1983) (quoting *Hughes v. Malone*, 247 S.E.2d 107 (Ga. Ct. App. 1978)); see *Brizak v. Needle*, 571 A.2d 975, 982-83 (N.J. Super. Ct. App. Div.), *cert. denied*, 584 A.2d 230 (N.J. 1990). As these cases demonstrate, however, the courts recognize an exception to the requirement of expert testimony when the attorney’s negligence is so obvious that lay persons can evaluate the attorney’s conduct based on their own common knowledge and experience. See *infra* text accompanying notes 29-57 (discussing the common experience exception to the requirement of expert testimony).

14. 571 A.2d 975 (N.J. Super. Ct. App. Div.), *cert. denied*, 584 A.2d 230 (N.J. 1990).

15. *Id.* at 984.

16. E.g., *Cianbro*, 804 F. Supp. at 791-93; *Applegate v. Dobrovir, Oakes & Gebhardt*, 628 F. Supp. 378 (D.D.C. 1985), *aff’d*, 809 F.2d 930 (D.C. Cir.) (mem.), *cert. denied*, 481 U.S. 1049 (1987); *Boigegrain*, 784 P.2d at 850; *Howard v. Walker*, 249 S.E.2d 45, 46 (Ga. 1978) (per curiam); 2 MALLEN & SMITH, *supra* note 5, § 27.22, at 690-91.

17. *Cianbro*, 804 F. Supp. at 789 (citing *Myers v. Beem*, 712 P.2d 1092, 1094 (Colo. Ct. App. 1985)).

18. 515 N.E.2d 891 (Mass. App. Ct. 1987).

19. *Id.* at 894 (quoting *Stevens v. Walker & Dexter*, 55 Ill. 151, 153 (1870)).

20. See *Bass v. Farr*, \_\_\_ S.C. \_\_\_, 434 S.E.2d 274, 277 (1993).



*C. Implications for Expert Testimony in Bench and Jury Trials*

A recurring question is whether it makes any difference regarding the necessity of expert testimony if the legal malpractice case is tried before a judge rather than a jury. After all, it would appear that the judge, as a lawyer, is obviously capable of understanding an attorney's duties and obligations. However, the courts have generally rejected the proposition that a bench trial obviates the necessity for an expert.<sup>21</sup>

Several reasons exist for rejecting the view that expert testimony is not necessary in bench trials. The most basic reason for not dispensing with expert testimony in bench trials is that cases should be decided on evidence and not on personal knowledge. If the trial judge determines the standard of care based on the judge's own knowledge, the adequacy of the judge's findings cannot be determined upon appellate review. Even if the judge explains the reasons in the opinion, no opportunity exists during trial for cross examination or rebuttal regarding the judge's determination of the standard of care. As a result, some courts have held that it would be a denial of due process for a judge to make such a finding without the underlying testimony of an expert.<sup>22</sup>

A second reason for not dispensing with expert testimony in bench trials is that trial judges are not knowledgeable about all areas of practice. But, even in those areas where a judge is knowledgeable, a judicial determination of the standard of care would be subjective and therefore unacceptable. Again, the judge's findings would be difficult, if not impossible, to evaluate.

This is not to say that a judge should never decide the standard of care in a malpractice case without expert testimony. Even in jury trials, some cases do not require expert testimony.<sup>23</sup> Also, in some limited cases the standard of care may be determined by referring to a statute, rule, or commonly accepted treatise on the issue.<sup>24</sup> However, absent these circumstances and in the interest of uniformity, the better practice is to require expert testimony in both bench and jury trials.<sup>25</sup> It logically follows that if a judge should not decide the standard of care in a bench trial without expert testimony, a jury trial judge should not dispense with expert testimony by instructing the jury

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21. *Lentino v. Fringe Employee Plans, Inc.*, 611 F.2d 474, 481 (3d Cir. 1979); *Bonhiver v. Rotenberg, Schwartzman & Richards*, 461 F.2d 925, 928-29 (7th Cir. 1972) (quoting *People v. Wallenberg*, 181 N.E.2d 143, 145 (Ill. 1962)); *House v. Maddox*, 360 N.E.2d 580, 583-84 (Ill. App. Ct. 1977); *Fishow v. Simpson*, 462 A.2d 540, 544 (Md. Ct. Spec. App. 1983); see also *Ambrosio & McLaughlin*, *supra* note 12, at 1382-85 (discussing the necessity of expert witness testimony in legal malpractice bench trials).

22. See *Bonhiver*, 461 F.2d at 928-29; *House*, 360 N.E.2d at 583.

23. See *infra* text accompanying notes 30-43.

24. *Fall River Sav. Bank v. Callahan*, 463 N.E.2d 555 (Mass. App. Ct.), *review denied*, 465 N.E.2d 26 (Mass. 1984).

25. *Lentino v. Fringe Employee Plans, Inc.*, 611 F.2d 474, 481 (3rd Cir. 1979).

on the standard of care.<sup>26</sup>

### D. Specialists

The subject of specialists raises interesting questions regarding qualifications of experts and the scope of expert testimony. Most courts agree, however, that in the technical specialties — such as taxation, probate, patent, trademark, and admiralty law — expert testimony is almost always necessary to prove the standard of care and any breach.<sup>27</sup> In these types of cases, the deviation or breach may not be understood by laymen without the assistance of additional expert testimony. For example, in a complex tax case the jury may need expert testimony not only to explain what a tax practitioner would do under certain circumstances, but also to explain why the conduct of the defendant attorney was a deviation.<sup>28</sup>

## IV. EXCEPTION TO THE RULE OF NECESSITY

### A. The Common Experience Exception

Courts that hold expert testimony is admissible and generally required in legal malpractice cases also recognize an exception to the expert testimony requirement when the alleged act of malpractice is clear and obvious, exceptionally egregious, or clearly palpable in that lay persons can determine from their own common knowledge and experience whether the attorney breached a standard of care.<sup>29</sup> For simplicity, the exception is referred to as

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26. See *Cleckner v. Dale*, 719 S.W.2d 535, 541-42 (Tenn. Ct. App. 1986); see also *Jones*, *supra* note 12, at 561-62 (discussing the *Cleckner* case).

27. 2 MALLIN & SMITH, *supra* note 5, § 27.15, at 670; *Ambrosio & McLaughlin*, *supra* note 12, at 1366 (citing *Wright v. Williams*, 121 Cal. Rptr. 194, 200 (Ct. App. 1975)). In some cases, once the standard of care is established by expert testimony, the deviation or breach of duty can be determined without the aid of additional expert testimony because it is easily understandable by laymen. See, e.g., *Mali v. Odom*, 295 S.C. 78, 81, 367 S.E.2d 166, 168 (Ct. App. 1988) (stating that additional expert testimony was not required because the defendant attorney himself had established the applicable standard of care in his published responses to interrogatories and depositions).

28. See, e.g., *Bent v. Green*, 466 A.2d 322, 325-26 (Conn. Super. Ct. 1983) (discussing the need for expert testimony in a client's legal malpractice defense to a tax attorney's suit for legal fees).

29. E.g., *Wagenmann v. Adams*, 829 F.2d 196, 218 (1st Cir. 1987); *Asphalt Eng'rs, Inc. v. Galusha*, 770 P.2d 1180, 1181-82 (Ariz. Ct. App. 1989); *Day v. Rosenthal*, 217 Cal. Rptr. 89, 102 (Ct. App. 1985), *cert. denied*, 475 U.S. 1048 (1986); *Betts v. Allstate Ins. Co.*, 201 Cal. Rptr. 528, 545 (Ct. App. 1984); *Glidden v. Terranova*, 427 N.E.2d 1169, 1170 (Mass. App. Ct. 1981); *Carlson v. Morton*, 745 P.2d 1133, 1137-38 (Mont. 1987); *Swanson v. Sheppard*, 445 N.W.2d 654, 657 (N.D. 1989); *Rizzo v. Haines*, 555 A.2d 58, 66 (Pa. 1989) (citing *Lentino v. Fringe Employee Plans, Inc.*, 611 F.2d 474 (3d Cir. 1979)); *Storm v. Golden*, 538 A.2d 61, 64

the "common experience" exception to the requirement of expert testimony in legal malpractice claims. A discussion of a few noteworthy cases will illustrate the concept.

In *Day v. Rosenthal*<sup>30</sup> an attorney sued the actress Doris Day and her late husband for breach of a retainer agreement.<sup>31</sup> The defendants counter-claimed alleging negligence.<sup>32</sup> At trial, the attorney was found liable to his clients for twenty-six million dollars.<sup>33</sup> On appeal, the attorney argued that the plaintiff had not proven his negligence through expert testimony.<sup>34</sup> The appellate court found that the attorney had, among other things: (1) received undisclosed profits from investment of his clients' funds; (2) created alter ego corporations and surreptitiously syphoned the clients' monies into his own pockets; (3) loaned the clients' monies to himself; (4) secretly represented promoters of ventures into which he induced the clients to become investors; (5) repeatedly involved his clients in business relationships with other clients without revealing his dual representation; and (6) commingled, misapplied, and failed to account for the clients' funds.<sup>35</sup>

The court noted that the attorney's conduct was so irresponsible that it seriously disregarded basic attorney obligations, reeked of negligence, and violated the basic precepts in the traditional relationship of attorney and client.<sup>36</sup> Further, it held that the attorney's blatant violation of the Rules of Professional Conduct established a deviation from standards and observed that "[i]t required no expert to tell the trial court that [the attorney's] perverted sense of duty to his client . . . is attorney negligence."<sup>37</sup>

Although the *Day* case was factually complicated,<sup>38</sup> it was quite simple regarding the concept of the standard of care in that the jury did not require expert testimony to determine that dishonest conduct is indeed malpractice. The *Day* court even suggested that expert testimony would be inappropriate in such a case.<sup>39</sup>

In a First Circuit case, *Wagenmann v. Adams*,<sup>40</sup> the plaintiff was arrested and temporarily incarcerated in a mental institution. His court appointed

(Pa. Super. Ct. 1988), *appeal denied*, 574 A.2d 71 (Pa. 1989).

30. 217 Cal. Rptr. 89 (Ct. App. 1985).

31. *Id.* at 94.

32. *Id.*

33. *Id.* at 93.

34. *Id.* at 99.

35. *Day*, 217 Cal. Rptr. at 94-98.

36. *Id.* at 102-04.

37. *Id.* at 102.

38. *Id.* at 93-98.

39. *See id.* at 102. ("If an expert testifies contrary to the Rules of Professional Conduct, the standards established by the rules govern and the expert testimony is disregarded.")

40. 829 F.2d 196 (1st Cir. 1987).

attorney did little or nothing to help him.<sup>41</sup> The plaintiff subsequently sued the arresting officers for civil rights violations and also sued the attorney for malpractice.<sup>42</sup> The jury returned a substantial verdict against the attorney. On appeal, the attorney argued that the plaintiff had failed to introduce any expert testimony to establish a standard of care or his deviation therefrom.<sup>43</sup>

However, the court held that the attorney's conduct was "so gross or obvious" that no expert testimony was necessary.<sup>44</sup> The attorney's conduct was negligent in many respects. First, the attorney ignored his client's requests and protestations of innocence and did not seek a commitment hearing, even though his client requested a hearing. Second, the attorney did not interview the psychiatrist involved, even though he knew that the psychiatrist was present in the courthouse and had rendered a favorable mental evaluation of the client. Finally, the attorney failed to interview any of the prosecution's witnesses.<sup>45</sup>

Additionally, the court noted that the jury had been instructed that the burden was on the plaintiff to show both that the attorney was negligent and that, but for his negligence, the plaintiff would not have been committed to the mental institution.<sup>46</sup> The court also stated that the attorney's failure to act after being retained to represent the client is the type of circumstance when expert testimony is not required. The court stated:

When the events of this litigation are displayed against the backdrop of the foregoing cases, it is clear that, because [the attorney] committed malpractice "so gross and obvious" that expert testimony was not required to prove it, this assignment of error must come to naught. Once [the attorney] undertook to represent [the client], he seems to have done almost nothing to protect his client — either before or after commitment.<sup>47</sup>

In *Betts v. Allstate Insurance Co.*<sup>48</sup> the plaintiff sued her insurer for bad faith refusal to settle an automobile accident case and sued the attorney furnished by the insurance company for negligently defending the suit.<sup>49</sup> The jury in the accident case had returned a verdict substantially in excess of the policy limits.<sup>50</sup> The court found that despite a substantial risk of an adverse

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41. *Id.* at 203-04.

42. *Id.* at 199.

43. *Id.* at 218.

44. *Id.* at 219.

45. *Wagenmann*, 829 F.2d at 219-20.

46. *Id.* at 220-21.

47. *Id.* at 219.

48. 201 Cal. Rptr. 528 (Ct. App. 1984).

49. *Id.* at 532.

50. *Id.*

verdict, the insurer absolutely rejected all offers to settle within the policy limits.<sup>51</sup> When the trial went badly, the attorney did not recommend to the insured that she should demand that the insurer settle within the policy limits. Instead, the attorney told her not to worry.<sup>52</sup> After the verdict, he did not recommend that she seek independent counsel and instead recommended that she decline assigning her rights against the insurer in exchange for a personal release.<sup>53</sup>

The court found that the evidence established both that a conflict of interest existed and that the attorney breached his duty to the insured by putting the interests of the insurer first.<sup>54</sup> The case rested upon a breach of both the duty to inform and the duty to disclose in a conflict situation, and the court held that no expert testimony was required:

[The attorney] asserts expert testimony was indispensable to a showing of its breach of duty. Expert testimony is not required to establish legal malpractice in all cases. This is not a case in which the question of breach turned on legal technicalities requiring the fine exercise of professional judgment. The issue was simply whether [the attorney] did or did not abandon [the client's] best interests in deference to the conflicting interest of [the insurer]. The proof on that issue was clear in its inculpatory impact. It speaks for itself without the aid of expert opinion.<sup>55</sup>

The *Betts* case is somewhat of an anomaly and is discussed to demonstrate that, in addition to cases like *Day* and *Wagenmann*, in which the attorney's negligence was easy to understand, cases that involve difficult issues of judgment and trial tactics — areas generally thought to require expert testimony — do not *always* require expert testimony. However, the outcome of *Betts* was apparently influenced by the perceived egregious conduct of the attorney in that the trial court found that the attorney's conduct was not one of mere negligence, but rather was "not the type of conduct to be condoned in the legal profession . . . ."<sup>56</sup> Finally, although the court eschewed the necessity of expert testimony, in fact, expert testimony was offered at trial to support the verdict.<sup>57</sup>

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51. *Id.* at 536-37.

52. *Id.* at 536, 545.

53. *Betts*, 201 Cal. Rptr. at 537.

54. *Id.* at 545.

55. *Id.* at 545 (citation omitted).

56. *Id.* at 546 (emphasis omitted) (quoting the trial court's opinion).

57. *See id.* at 545.

V. EXCEPTIONS TO THE REQUIREMENT OF EXPERT TESTIMONY  
BY CLASSIFICATION OF ISSUES

Some courts have attempted to categorize the need for expert testimony based on the issue involved. For example, in *Carlson v. Morton*<sup>58</sup> the court outlined the types of cases that typically fall within the common experience exception. They include:

- a. failure of a criminal defendant's attorney to appear in court on behalf of his client;
- b. failure to file suit within the statute of limitations;
- c. failure to retain a first mortgage for a seller on real estate when such retention is clearly part of the contract;
- d. failure to notify the client that the attorney is resigning from the case, thereby resulting in a default; and
- e. failure to insulate one client from the debts of another client.<sup>59</sup>

Unfortunately, such generalities are of limited use because for every such case, either the facts in another case will suggest a different result or some other court will simply disagree with where the line should be drawn between the requirement of expert testimony and the common experience exception. Thus, while general parameters may exist, there is no bright-line test to determine when expert testimony is required. What appears obvious to one court may not be obvious to another; however, the attorney must resolve any doubt in favor of retaining an expert.

*Lenius v. King*<sup>60</sup> illustrates how one judge's opinion regarding the necessity of expert testimony may differ significantly from another judge's opinion. In that case, the plaintiff employed an attorney to pursue two mechanic's lien cases. The cases were dismissed for lack of prosecution, and the plaintiff sued the attorney for malpractice.<sup>61</sup> Substantial expert testimony was offered at trial regarding whether the plaintiff would have recovered in his cases.<sup>62</sup> The trial court, however, granted the attorney's motion for judgment notwithstanding the verdict on the ground that the evidence was insufficient to support the jury's verdict for want of expert testimony that the attorney had breached the standard of care.<sup>63</sup> On appeal, the majority agreed with the trial court's conclusion that the complexity of the matter required expert testimony

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58. 745 P.2d 1133 (Mont. 1987).

59. *Id.* at 1137-38 (citations omitted).

60. 294 N.W.2d 912 (S.D. 1980).

61. *Id.* at 913.

62. *See id.* at 914.

63. *Carlson*, 745 P.2d at 913.

on the standard of care.<sup>64</sup> The dissenting judge, however, dryly observed:

Finally, it does not take a Philadelphia lawyer to figure out that letting actions lie dormant over six years and thirteen calendar calls until they are dismissed for lack of prosecution is a breach of standards not only in the legal profession but in any walk of life. The jury really needed no expert testimony in that regard.<sup>65</sup>

*A. Breach of Contract or Express Instructions*

In a few cases, courts have held that expert testimony is not necessary when the claim is based on a contract breach or failure to follow a client's express instructions. For example, in *McInnis v. Hyatt Legal Clinics*<sup>66</sup> the plaintiff instructed his attorney that none of his divorce proceedings should appear in the newspaper because he lived in a small town and feared that publication in the town's newspaper would be detrimental to his business. The attorney, in writing, agreed to these instructions.<sup>67</sup> However, the local newspaper published the divorce when the attorney initiated service by publication without first informing his client. In this case, the court held that expert testimony was unnecessary because the attorney disobeyed the lawful instructions of his client, thereby breaching their agreement.<sup>68</sup>

In *Asphalt Engineers, Inc. v. Galusha*<sup>69</sup> the plaintiff sued its attorney for breach of contract and negligence based on the attorney's failing to file and foreclose mechanic's liens as requested by the client and allowing the time for filing to expire.<sup>70</sup> The court held that liability attached based on breach of contract without the need of expert testimony.<sup>71</sup>

In *Jarnagin v. Terry*<sup>72</sup> the plaintiff sued her attorney for failing to follow her instructions regarding division of marital debts. The plaintiff alleged that she instructed the attorney that a specific debt should be made an obligation of her husband and that although the attorney agreed to follow the instruction, he did not do so.<sup>73</sup> The trial court granted a directed verdict for the attorney at the close of the plaintiff's case based on the plaintiff's lack of expert testimony.<sup>74</sup> However, the case was reversed on appeal.<sup>75</sup> The plaintiff's

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64. *Id.* at 914-15.

65. *Id.* at 915 (Dunn, J., dissenting).

66. 461 N.E.2d 1295 (Ohio 1984).

67. *Id.* at 1296.

68. *See id.* at 1296-97.

69. 770 P.2d 1180 (Ariz. Ct. App. 1989).

70. *Id.* at 1181.

71. *Id.* at 1181-82.

72. 807 S.W.2d 190 (Mo. Ct. App. 1991).

73. *Id.* at 191.

74. *Id.*

claim was founded on breach of contract rather than negligence. As such, the lawyer's duty to his client was not based on standards established by the legal profession, but was instead based on the law of agency.<sup>76</sup> The court thus found that the lawyer's breach of duty and the flow of damages to the client were within the common understanding of jurors.<sup>77</sup>

The above cases illustrate the variations of the common experience exception. When the claim is based on a failure to follow agreed upon instructions or to perform an agreed upon task, a trier of fact generally can determine such an issue without expert testimony. On the other hand, if the issue involves the attorney's competence in performing the task, a claim based on breach of contract will not obviate the necessity of expert testimony, because the question depends on the standard of care.

In *Storm v. Golden*<sup>78</sup> the plaintiff sued her attorney for negligence and breach of contract arising from the attorney's representation in a real estate transaction.<sup>79</sup> The trial court granted a nonsuit for the attorney based on the plaintiff's failure to offer expert testimony on the standard of care.<sup>80</sup> On appeal, the plaintiff argued that expert testimony was not necessary on her contract claim.<sup>81</sup> The court noted that the breach of contract count did not allege failure to follow specific instructions or breach of a specific provision of a contract. Instead, the court found that the plaintiff's contract claim "sounds in negligence by alleging [the attorney] failed to exercise the appropriate standard of care."<sup>82</sup>

A contract of employment carries an implied covenant by the attorney to exercise an appropriate standard of care. While a plaintiff may denominate a claim as contractual, no real distinction exists between contract and tort claims when the standard of care is the core issue, and the analysis to determine whether expert testimony is required is the same analysis in either case.<sup>83</sup>

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75. *Id.* at 195.

76. *Id.* at 191 (citing *Olfe v. Gordon*, 286 N.W.2d 573, 578 (Wis. 1980)).

77. *Jarnagin*, 807 S.W.2d at 191 (citing *McInnis v. Hyatt Legal Clinics*, 461 N.E.2d 1295, 1297 (Ohio 1984)).

78. 538 A.2d 61 (Pa. Super. Ct. 1988), *appeal denied*, 574 A.2d 71 (Pa. 1989).

79. *Id.* at 62.

80. *Id.*

81. *Id.* at 65.

82. *Id.* at 65.

83. *See Storm*, 538 A.2d at 65; *see also Wagenmann v. Adams*, 829 F.2d 196, 219 (1st Cir. 1987) (discussing the attorney's failure to abide by his client's wishes); *Frank v. Bloom*, 634 F.2d 1245, 1256-58 (10th Cir. 1980) (discussing proof necessary in establishing attorney misconduct in contract matters); *O'Neil v. Bergan*, 452 A.2d 337, 343 (D.C. 1982) (stating that the same standard of care is required of the attorney whether the claim is based on tort or contract); *Fishow v. Simpson*, 462 A.2d 540, 544 (Md. Ct. Spec. App. 1983) (holding that expert witness testimony was required in a case where the cause of action for malpractice was based on breach of contract).



### B. *Testimony by the Defendant Attorney Regarding the Standard of Care*

When the defendant attorney testifies about the standard of care and the conduct that allegedly breached the standard, the plaintiff might not need to offer further expert testimony to establish a prima facie case. In *Mali v. Odom*<sup>84</sup> a purchaser retained an attorney to examine the title to real property and to handle the property closing.<sup>85</sup> The attorney knew that the purchaser intended to operate a school on the property. However, the attorney failed to disclose restrictive covenants on the property, and the purchaser sued the attorney for malpractice after a court enjoined the purchaser from utilizing the property for commercial use.<sup>86</sup> In response to the attorney's argument that the plaintiff did not establish the standard of care by expert testimony, the court noted that the defendant, a practicing attorney, had established the applicable standard of care by admitting that he had a duty both to disclose the restrictions and to explain their impact on the subject property.<sup>87</sup> Therefore, the only evidence in dispute was whether the attorney provided such disclosure and explanation at or prior to the closing.<sup>88</sup> The court held that a jury could determine whether the attorney breached the standard of care without further expert testimony.<sup>89</sup>

Similarly, in *Asphalt Engineers, Inc. v. Galusha*<sup>90</sup> the defendant attorney answered hypothetically questions regarding the duties owed to a client and what conduct would and would not meet the appropriate standard of care. Based on this questioning, the court held that the attorney's acknowledgment that the alleged conduct fell below the standard of care rendered additional expert testimony unnecessary.<sup>91</sup>

An interesting question arises from cases such as those that hold that additional expert witness testimony is not necessary when the defendant attorney either testifies to the standard of care or concedes that the alleged conduct constitutes negligence: Can a defendant attorney be compelled to testify against himself in a legal malpractice action? As a practical matter, it would seem difficult if not impossible for a defendant attorney to refuse to testify to the standard of care and at the same time attempt to defend himself in the malpractice action. On the other hand, when the plaintiff's attorney has not deposed the defendant attorney or named him as an expert in discovery,

84. 295 S.C. 78, 367 S.E.2d 166 (Ct. App. 1988).

85. *Id.* at 80, 367 S.E.2d at 168.

86. *Id.*

87. *Id.* at 81, 367 S.E.2d at 168-69.

88. *Id.* at 81, 367 S.E.2d at 169.

89. *Mali*, 295 S.C. at 82, 367 S.E.2d at 169.

90. 770 P.2d 1180 (Ariz. Ct. App. 1989).

91. *Id.* at 1182.

an attempt to call the him to testify might be defeated.<sup>92</sup> Several cases illustrate this dilemma. In *Gibson v. Talley*<sup>93</sup> the trial court refused to compel the defendant attorney to answer hypothetical questions at deposition seeking to elicit his opinion as an expert.<sup>94</sup> The Georgia Court of Appeals upheld this ruling as within the trial judge's discretion to protect a witness from oppressive and unfair questions and demands.<sup>95</sup> Additionally, in *Beattie v. Firnschild*<sup>96</sup> the court stated that a plaintiff in a malpractice case may elicit required expert testimony from the defendant attorney, but held that it was within the trial court's discretion to admit or exclude such testimony.<sup>97</sup> The trial court had excluded the testimony because the plaintiff gave no notice to the defendant that he would be called as an expert.<sup>98</sup>

### C. Recurring Problem Areas

While cases involving the use of expert testimony are generally fact specific, certain issues recur often enough to give insight to the courts' attitude towards those issues. The following cases are again discussed in the context of the necessity question. Later, some of the same cases are again discussed in the context of whether the expert testimony was sufficient to establish the standard of care.

#### 1. Rules Governing Ethical Conduct

In many cases, the argument has been made that the Rules of Professional Conduct<sup>99</sup> should be used to determine the standard of care in a civil case and that resort to these Rules obviates the necessity for expert testimony.<sup>100</sup> However, the preambles to both the Model Rules of Professional Conduct and the Model Code of Professional Responsibility expressly disclaim any intent to define liability standards in civil cases.<sup>101</sup>

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92. See *Lipscomb v. Krause*, 151 Cal. Rptr. 465 (Ct. App. 1978).

93. 275 S.E.2d 154 (Ga. Ct. App. 1980).

94. *Id.* at 156.

95. *Id.* at 156-57.

96. 394 N.W.2d 107 (Mich. Ct. App. 1986).

97. *Id.* at 111 (citing *Wallace v. Garden City Osteopathic Hosp.*, 314 N.W.2d 557 (Mich. Ct. App. 1982), *rev'd on other grounds*, 330 N.W.2d 850 (Mich. 1983) and *Wood v. Posthuma*, 310 N.W.2d 341 (Mich. Ct. App. 1981)).

98. *Id.*

99. Either the new Model Rules of Professional Conduct or the old Model Code of Professional Responsibility, depending on the jurisdiction and age of the case.

100. See, e.g., *Day v. Rosenthal*, 217 Cal. Rptr. 89, 102 (Ct. App. 1985) (stating that an attorney's ethical duties are established by the Rules of Professional Conduct and cannot be changed by expert testimony), *cert. denied*, 475 U.S. 1048 (1986).

101. MODEL RULES OF PROFESSIONAL CONDUCT Scope (1992); MODEL CODE OF PROFESSION-

Despite the disclaimers, the Rules have been argued as an alternative to the necessity for expert testimony on the basis that lawyers may not operate under a lesser standard.<sup>102</sup> Also, it has been argued that introducing the Rules into evidence<sup>103</sup> or a jury instruction explaining the Rules,<sup>104</sup> or both, would permit a jury of lay persons to decide a legal malpractice case without expert testimony. In those situations explicitly governed by the Rules, such as the Rules dealing with conflicts of interest,<sup>105</sup> this argument is persuasive. However, in other cases, even when the Rules are explicit, the complexity of the transaction or underlying case may be such that a lay person could not understand how a lawyer should have acted under the circumstances without expert testimony. Also, proof of a generic ethical duty, such as the duty to represent a client competently,<sup>106</sup> obviously is of no more assistance to the jury than is a generic charge of the law of negligence.

In *Day v. Rosenthal*<sup>107</sup> the court not only used the Rules of Professional Conduct in lieu of expert testimony, but also held that any expert testimony contrary to the Rules was not admissible.<sup>108</sup> The facts of *Day*, however, clearly fall within the common experience exception.<sup>109</sup>

In *Betts v. Allstate Insurance Co.*<sup>110</sup> the court dispensed with expert testimony in a much more complex situation. *Betts* involved the delicate balancing of interests required when an attorney represents both the insured and the insurer in a liability case<sup>111</sup> — a difficult, but often recurring, situation. Most laymen would have no idea how defense attorneys customarily resolve or deal with this conflict of interest. Therefore, *Betts* can only be explained on the basis that the attorney's conduct was so egregious that an explanation of the standard of care was unnecessary.<sup>112</sup>

The majority of courts hold that the Rules of Professional Conduct do not

AL RESPONSIBILITY Preliminary Statement (1983); see also *Hizey v. Carpenter*, 830 P.2d 646, 652-53 (Wash. 1992) (en banc) (stating that in a legal malpractice action, the jury may not be informed, either directly or indirectly through expert testimony, of the Rules of Professional Conduct or the Code of Professional Responsibility, because the Rules expressly disclaim any intent to create civil liability standards).

102. See, e.g., *Day*, 217 Cal. Rptr. at 102.

103. See, e.g., *Rizzo v. Haines*, 555 A.2d 58, 67 (Pa. 1989).

104. See, e.g., *Cornell v. Wunschel*, 408 N.W.2d 369, 378 (Iowa 1987).

105. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7, 1.8, 1.9 (1992); MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5 (1983).

106. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1992); MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 6 (1983).

107. 217 Cal. Rptr. 89 (Ct. App. 1985), cert. denied, 475 U.S. 1048 (1986).

108. *Id.* at 102.

109. See *supra* notes 29-39 and accompanying text.

110. 201 Cal. Rptr. 528 (Ct. App. 1984).

111. *Id.* at 545.

112. See *id.* Ironically, some expert testimony was actually offered at trial. See *id.* at 545.

establish the standard of care in civil cases and are not admissible as evidence.<sup>113</sup> Other courts hold that the Rules may be used as evidence of the standard of care,<sup>114</sup> and some courts even hold that violation of an applicable Rule creates a rebuttable presumption of malpractice.<sup>115</sup> However, only a few courts hold that proof of a violation of a Rule of Professional Conduct is alone sufficient to establish malpractice without expert testimony.<sup>116</sup>

The question of whether the Rules of Professional Conduct are either determinative of or evidence of the standard of care in civil actions is different from the question of whether the Rules obviate the necessity for expert testimony. The few cases holding that expert testimony is not required are generally based on the common knowledge exception or violation of an explicit Rule of Professional Conduct, or a combination of both.<sup>117</sup>

On the other hand, those cases holding that the Rules do not establish the standard of care do not further preclude expert witnesses from basing their opinion on the attorney's violation of the Rules.<sup>118</sup> These cases recognize that the Rules are not designed to explain the standard of care in civil actions, but instead recognize that attorney conduct that violates the Rules may not involve a breach of duty to a client.<sup>119</sup> However, the Rules do provide a good guide even though at times they may coincide with the duties and

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113. See *Fishman v. Brooks*, 487 N.E.2d 1377, 1381-82 (Mass. 1986) ("Expert testimony concerning the fact of an ethical violation is not appropriate . . . . A judge can instruct the jury (or himself) concerning the requirements of ethical rules."); *Hooper v. Gill*, 557 A.2d 1349, 1352 (Md. Ct. Spec. App.) (The general rule that violation of the Rules of Professional Conduct does not give rise to civil liability "has been adopted by the overwhelming majority of courts."), *cert. denied*, 564 A.2d 1182 (Md. 1989), *cert. denied*, 496 U.S. 906 (1990); *Ambrosio & McLaughlin*, *supra* note 12, at 1360-61 ("[M]ost courts that have addressed the issue hold that violations of the Rules of Professional Conduct do not give rise to an independent cause of action against the attorney nor are the Rules themselves a substitute for the legal standard of care in malpractice cases.") (citations omitted).

114. See *Mayol v. Summers, Watson & Kimpel*, 585 N.E.2d 1176, 1186 (Ill. App. Ct.) (holding that the trial court could quote the Code of Professional Responsibility in its jury instructions), *appeal denied*, 596 N.E.2d 630 (Ill. 1992); *Fishman*, 487 N.E.2d at 1381 ("[I]f a plaintiff can demonstrate that a disciplinary rule was intended to protect one in his position, a violation of that rule may be some evidence of the attorney's negligence."); *Martinson Bros. v. Hjellum*, 359 N.W.2d 865, 875 (N.D. 1985) (Violation of the Rules of Professional Conduct "merely constituted evidence to be considered by the trier of fact.").

115. *Beattie v. Firmschild*, 394 N.W.2d 107, 109 (Mich. Ct. App. 1986) (citing *Sawabini v. Desenberg*, 372 N.W.2d 559 (Mich. Ct. App. 1985)); *Lipton v. Boesky*, 313 N.W.2d 163, 167 (Mich. Ct. App. 1981) (citing *Zeni v. Anderson*, 243 N.W.2d 270 (Mich. 1976)).

116. See *Day v. Rosenthal*, 217 Cal. Rptr. 89, 102 (Ct. App. 1985), *cert. denied*, 475 U.S. 1048 (1986); *Cornell v. Wunschel*, 408 N.W.2d 369, 378 (Iowa 1987); *Rizzo v. Haines*, 555 A.2d 58, 67 (Pa. 1989).

117. See *Day*, 217 Cal. Rptr. at 102; *Cornell*, 408 N.W.2d at 378; *Rizzo*, 555 A.2d at 66.

118. See, e.g., *Hizey v. Carpenter*, 830 P.2d 646, 654 (Wash. 1992) (en banc).

119. See, e.g., *Northwestern Life Ins. Co. v. Rogers*, 573 N.E.2d 159, 163 (Ohio Ct. App. 1989).

standards applicable in a given case.<sup>120</sup> Usually, these cases hold that expert testimony is necessary to explain the standard of care unless the common experience exception applies. Although the Rules may be one factor considered by the expert, expert testimony must still be provided to explain the standard of care.<sup>121</sup>

Those cases holding that a violation of the Rules of Professional Conduct may be evidence of or create a rebuttable presumption of malpractice still require expert testimony, unless the case falls within the common experience exception.<sup>122</sup> As the court explained in *Northwestern Life Insurance Co. v. Rogers*:<sup>123</sup>

It is clear that there can be instances where noncompliance with the Code of Professional Responsibility does not result in malpractice. Before legal malpractice can occur, the client must have incurred damages which were directly and proximately caused by the attorney's malpractice. Because of the very nature and complexity of the Code of Professional Responsibility and the conduct of legal matters, expert testimony is required to support the allegations except in those cases which are so patently obvious as to negate this requirement.<sup>124</sup>

The interplay between the Rules of Professional Conduct and expert testimony raises substantial questions about the scope and sufficiency of the expert testimony. For practical purposes, the Rules do not have a material impact on the question of whether expert testimony is needed in cases when the attorney has violated a Rule of Professional Conduct — although violation of a Rule does have an impact on the scope and sufficiency of testimony required. In summary, unless the common experience exception applies, the practitioner must be prepared to present expert testimony on the standard of care even if the Rules do apply.

## 2. Failure to Prosecute or Defend

The common experience exception is most often applied in cases alleging that the attorney failed to prosecute or defend a claim. An attorney allowing a statute of limitations to run is the most common example of a malpractice case that does not require expert testimony.<sup>125</sup> The statute of limitations

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120. See, e.g., *Lazy Seven Coal Sales, Inc. v. Stone & Hinds*, 813 S.W.2d 400, 405 (Tenn. 1991).

121. See *Carlson v. Morton*, 745 P.2d 1133, 1137 (Mont. 1987); *Northwestern Life Ins. Co.*, 573 N.E.2d at 163-64; *Lazy Seven Coal Sales, Inc.*, 813 S.W.2d at 407; *Hizey*, 830 P.2d at 654.

122. See *Beattie v. Firmschild*, 394 N.W.2d 107, 110 (Mich. Ct. App. 1986).

123. 573 N.E.2d 159 (Ohio Ct. App. 1989).

124. *Id.* at 163-64.

125. *E.g.*, *Gray v. Hallett*, 525 N.E.2d 89 (Ill. App. Ct.), *appeal denied*, 530 N.E.2d 245 (Ill.

cases frequently involve the failure of the attorney to properly research or investigate the claim,<sup>126</sup> which by itself may fall within the common experience exception. However, when a question exists concerning either the interpretation or applicability of the statute of limitations, the case may require expert testimony.<sup>127</sup> For example, in *Koeller v. Reynolds*<sup>128</sup> the court held that expert testimony was required because the defendant's explanation for not filing within the statute of limitations was that he did not think the plaintiff had a just claim.<sup>129</sup>

Some courts have held that a default judgment caused by the attorney's failure to file required documents does not require expert testimony to establish a prima facie malpractice case.<sup>130</sup> For example, in *Asphalt Engineers, Inc. v. Galusha*<sup>131</sup> the Arizona Court of Appeals held that the attorney's failure to file various liens and foreclosure actions supported a finding of negligence without expert witness testimony.<sup>132</sup>

However, *Lenius v. King*<sup>133</sup> is illustrative of the danger in not retaining an expert in what appears to be a common experience case.<sup>134</sup> In *Lenius* the South Dakota Supreme Court held that the reasons underlying the attorney's failure to prosecute for over six years, resulting in the dismissal of the action, were sufficiently complex to require expert testimony concerning whether the attorney deviated from the standard of care.<sup>135</sup>

1988); *House v. Maddox*, 360 N.E.2d 580 (Ill. App. Ct. 1977); *Watkins v. Sheppard*, 278 So. 2d 890 (La. Ct. App. 1973); *Hickox v. Holleman*, 502 So. 2d 626 (Miss. 1987); *Brizak v. Needle*, 571 A.2d 975 (N.J. Super. Ct. App. Div.), *cert. denied*, 584 A.2d 230 (N.J. 1990); *see also* 2 MALLIN & SMITH, *supra* note 5, § 27.15, at 672 ("The most common occurrence, a statute of limitations missed because of the attorney's inadvertent failure to ascertain or properly calendar the date when suit or action must be pursued, does not require expert testimony."); *DiSabatino*, *supra* note 12, § 5 (discussing numerous cases in which expert testimony has not been required to establish legal malpractice when the attorney allows the statute of limitations to run).

126. *See, e.g., Watkins*, 278 So. 2d at 892; *Hickox*, 502 So. 2d at 636; *Brizak*, 571 A.2d at 983.

127. *E.g., Cianbro Corp. v. Jeffcoat & Martin*, 804 F. Supp. 784, 792-93 (D.S.C. 1992), *aff'd*, 10 F.3d 806 (4th Cir. 1993) (mem.); *Brainerd v. Kates*, 386 N.E.2d 586, 589-90 (Ill. App. Ct. 1979).

128. 344 N.W.2d 556 (Iowa Ct. App. 1983).

129. *Id.* at 561.

130. *See Law Offices of Lawrence J. Stockler v. Rose*, 436 N.W.2d 70, 87-88 (Mich. Ct. App. 1989); *see also Hill Aircraft & Leasing Corp. v. Tyler*, 291 S.E.2d 6, 11 (Ga. Ct. App. 1982) (requiring expert testimony, but stating in dicta that no expert testimony would be necessary if an attorney allowed a case to go into default).

131. 770 P.2d 1180 (Ariz. Ct. App. 1989).

132. *Id.* at 1182.

133. 294 N.W.2d 912 (S.D. 1980).

134. *Id.* at 914.

135. *Id.* at 914-15.

### 3. *Errors of Judgment*

#### i. *Trial Tactics*

An attorney who exercises good faith and informed judgment is not liable for an error in judgment. The rule is well stated in *Hodges v. Carter*<sup>136</sup> as follows:

An attorney who acts in good faith and in an honest belief that his advice and acts are well founded and in the best interest of his client is not answerable for a mere error of judgment or for a mistake in a point of law which has not been settled by the court of last resort in his State and on which reasonable doubt may be entertained by well informed lawyers.<sup>137</sup>

In order to overcome this judgmental immunity rule, a plaintiff must show that the judgment exercised did not meet the standard of care that a reasonably prudent attorney would have exercised under the same or similar circumstances.

In *Rorrer v. Cooke*<sup>138</sup> the court referred to rules developed in medical malpractice actions to explain how judgmental immunity interacts with the standard of care.<sup>139</sup> The court stated, "The applicable standard, then, is completely unitary in nature, combining in *one test* the exercise of 'best judgment,' 'reasonable care and diligence' and compliance with the 'standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities.'"<sup>140</sup>

*Rorrer* involved a legal malpractice case arising out of the prosecution of a medical malpractice action. The plaintiff alleged that the defendant attorney failed to properly investigate and to present evidence at the trial of the medical malpractice case.<sup>141</sup> The defendant asserted that he exercised his best judgment and used reasonable care in the exercise of his legal skills.<sup>142</sup> The trial court granted summary judgment on the basis of judgmental immunity.<sup>143</sup> However, on appeal, the judgment was reversed. In opposition to the attorney's motion for summary judgment, plaintiff had presented an affidavit from an attorney experienced in medical malpractice cases who opined that the

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136. 80 S.E.2d 144 (N.C. 1954).

137. *Id.* at 146 (citations omitted).

138. 317 S.E.2d 34 (N.C. Ct. App. 1984), *rev'd on other grounds*, 329 S.E.2d 355 (N.C. 1985).

139. *Id.* at 40.

140. *Id.* at 40 (quoting *Wall v. Stout*, 311 S.E.2d 571, 577 (N.C. 1984)).

141. *Id.* at 38.

142. *Id.* at 36.

143. *See Rorrer*, 317 S.E.2d at 36-37.

defendant had argued a medical theory that was untenable in that the medical expert witnesses at trial were not supportive of the theory.<sup>144</sup> The affiant further opined that the defendant had failed to consult with and discover evidence from other attending physicians.<sup>145</sup> The plaintiff asserted that such failure was a deviation from the standard for handling medical malpractice cases.<sup>146</sup> The court held that the plaintiff's affidavit created a question of fact on the negligence issue, and the exercise of the attorney's judgment would not be a defense if his judgment amounted to a deviation from the standard of care.<sup>147</sup>

This case is a good example of the critical nature of expert testimony when an error of judgment is alleged. The North Carolina Court of Appeals noted that the cases in which the courts were most reluctant to find negligence on the part of an attorney without expert testimony are those cases involving matters of judgment, such as trial tactical decisions.<sup>148</sup> Other examples of judgmental decisions that require expert testimony include: the election of theories to include in a pleading,<sup>149</sup> joinder of parties,<sup>150</sup> introduction of evidence of expert testimony,<sup>151</sup> and choice of defenses.<sup>152</sup>

Of course, the mere assertion of a judgmental immunity defense would be ineffective and would not require expert testimony if the common experience exception applies. The defense must relate to the exercise of professional judgment rather than the exercise of mere common sense.<sup>153</sup>

## ii. Law Which Is Unsettled or Uncertain

*Cianbro Corp. v. Jeffcoat & Martin*<sup>154</sup> is a good example of the need for expert testimony in areas where the law is uncertain or unsettled. In *Cianbro* the defendant attorney was retained to file and foreclose a mechanic's lien.<sup>155</sup> The applicable statute required the lien to be filed within ninety days

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144. *Id.* at 37.

145. *Id.* at 38.

146. *Id.*

147. *Id.*

148. *Rorrer*, 317 S.E.2d at 39 (citing DiSabatino, *supra* note 12, at 174); *see also* Ambrosio & McLaughlin, *supra* note 12, at 1367 (discussing attorney judgment errors and the standard of care).

149. *Baker v. Beal*, 225 N.W.2d 106, 112-13 (Iowa 1975).

150. *Gans v. Mundy*, 762 F.2d 338, 343-44 (3d Cir.), *cert. denied*, 474 U.S. 1010 (1985).

151. *Mayol v. Summers, Watson & Kimpel*, 585 N.E.2d 1176 (Ill. App. Ct.), *appeal denied*, 596 N.E.2d 630 (Ill. 1992) (mem.).

152. *Martinson Bros. v. Hjellum*, 359 N.W.2d 865, 874-75 (N.D. 1985).

153. *See Bowman v. Doherty*, 686 P.2d 112, 119 (Kan. 1984).

154. 804 F. Supp. 784 (D.S.C. 1992), *aff'd*, 10 F.3d 806 (4th Cir. 1993) (mem.).

155. *Id.* at 786.



of the last work done, but did not prohibit an earlier filing. The foreclosure section of the statute further required suit to be filed within six months from the date of the last work done. The attorney filed the action within that six months, but more than six months after the lien was filed.<sup>156</sup>

In this case, there was disagreement between the master-in-equity and the circuit court concerning whether the action was timely filed.<sup>157</sup> However, the court of appeals held it was not timely filed and dissolved the lien.<sup>158</sup> The attorneys retained to prosecute the mechanic's lien action were then sued for malpractice.<sup>159</sup>

The district court in *Cianbro* observed that there was no prior case interpreting the statute.<sup>160</sup> Therefore, "an attorney cannot be held liable for following the plain terms of a statute when there are not compelling circumstances to suggest that the attorney should have acted other than in conformity with the statute."<sup>161</sup> Moreover, the court held that expert testimony was essential to establish the applicable standard of care and its alleged breach in the defendant's failure to timely file actions to foreclose the mechanic's liens.<sup>162</sup> The court further held that expert testimony was required on the issue of whether the defendant attorney should have recognized the uncertainty of the law and informed his client of the risks.<sup>163</sup> There was no evidence in the record of what other lawyers of reasonable prudence would have done under the same or similar circumstances. As a result, the court granted summary judgment in favor of the defendant attorney.<sup>164</sup>

In *Devine v. Wilson*<sup>165</sup> a client lost his right of judicial review of an employment termination case because his attorney failed to serve the petition for judicial review properly.<sup>166</sup> The defendant attorney argued that at the time of the service, the law was unclear about which parties should be served. The court conceded that the question of service was one of first impression and held that an attorney is not required to predict future decisions that clarify the law.<sup>167</sup> Therefore, the court stated that in these types of cases, expert testimony is essential to establish the requisite standard of care.<sup>168</sup> However,

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156. *Id.* at 787.

157. *See id.*

158. *Id.* at 787.

159. *Cianbro Corp.*, 804 F. Supp. at 788.

160. *Id.* at 790.

161. *Id.* at 790.

162. *Id.* at 790-91.

163. *Id.* at 792.

164. *Cianbro Corp.*, 804 F. Supp. at 793.

165. 373 N.W.2d 155 (Iowa Ct. App. 1985).

166. *Id.* at 157.

167. *Id.* at 157-58.

168. *Id.* at 158.

because the plaintiff did not offer any expert testimony, the court affirmed the grant of judgment notwithstanding the verdict.<sup>169</sup>

Where the law is unclear, but there is reason to believe that a particular course of action being pursued may be adverse to the client, the attorney has a duty to advise the client of the potential exposure if his interpretation is incorrect.<sup>170</sup>

### iii. Failure to Inform

The duty of the attorney to keep the client informed arises in a variety of ways. This duty includes the duty to disclose and the duty to give the client adequate information to make a decision, such as whether or not to settle a matter. In conflict of interest cases, the issue of non-disclosure or the adequacy of disclosure is often at dispute.

In *ABC Trans National Transport, Inc. v. Aeronautics Forwarders, Inc.*<sup>171</sup> the plaintiff alleged that its corporate attorney had breached his fiduciary duty and acted adversely to its interests by secretly representing a competitor's interests.<sup>172</sup> The attorney's position was that his representation was a "competing," not a "conflicting," interest.<sup>173</sup> The court rejected the client's claim in the absence of expert testimony and noted that "[u]nless the conflict is so clear as to be undisputed, expert testimony is generally necessary to prove lawyer malpractice."<sup>174</sup>

The attorney's duty to inform was also at issue in *Reed v. Verwoerd*.<sup>175</sup> In that case, the client answered the attorneys fee collection suit with a claim of legal malpractice alleging that her attorneys failed to adequately disclose the basis of their fee.<sup>176</sup> The client's mother was killed in an accident. Subsequently, the client hired the defendant attorneys on a one-third contingency fee basis to represent her in the wrongful death and survival actions.<sup>177</sup> The attorneys settled the case on a structured basis for \$180,960. The plaintiff then entered into a new fee agreement with the client for a fee of \$60,320.00. The client's new fee agreement provided for a lump sum payment of

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169. *Id.*

170. *First Nat'l Bank v. Diane, Inc.*, 698 P.2d 5, 10 (N.M. Ct. App. 1985) (citing *Smith v. Saint Paul Fire & Marine Ins. Co.*, 366 F. Supp. 1283, 1290 (M.D. La. 1973), *aff'd*, 500 F.2d 1131 (5th Cir. 1974)).

171. 413 N.E.2d 1299 (Ill. 1980).

172. *Id.* at 1308-09.

173. *Id.* at 1310.

174. *Id.* at 1311 (citing *Schmidt v. Hinshaw, Culbertson, Moelmann, Hoban & Fuller*, 394 N.E.2d 559 (Ill. App. Ct. 1979)).

175. 490 So. 2d 421 (La. Ct. App. 1986).

176. *Id.* at 424, 427.

177. *Id.* at 423.

\$50,320.00 with the balance to be paid in monthly installments. The client paid all but \$10,000 of the fee.<sup>178</sup> When the attorneys sued for the balance of their fee, the client asserted that the attorneys breached their fiduciary duty to her by failing to disclose that the second fee agreement actually amounted to more than one-third of the settlement.<sup>179</sup> The plaintiff offered no expert testimony "with regard to the standard of care an attorney must meet in devising contingent fee contracts based upon a structured settlement."<sup>180</sup> The court found the absence of such evidence to be fatal to the plaintiff's claim.<sup>181</sup>

In *Berman v. Rubin*<sup>182</sup> the court held that expert testimony was required to prove the alleged negligence of an attorney who failed to explain adequately a settlement agreement for alimony and child support in a divorce case.<sup>183</sup> When an attorney fails to inform a client of a settlement offer, however, a number of courts have held that expert testimony is not required under the common experience exception.<sup>184</sup> Additionally, when the question involves the propriety of recommending a settlement offer, as opposed to the attorney's failure to communicate the offer, an expert probably will be necessary because the fact that the attorney made a recommendation raises the issue of the attorney's judgment.<sup>185</sup>

#### iv. *Drafting and Recording Documents*

The subject of drafting and recording documents frequently produces legal malpractice claims. Once again, the cases go both ways on the necessity of expert testimony.

A client sued an attorney for omitting a residuary clause from a will in *Hamilton v. Needham*.<sup>186</sup> The defendant lawyers asserted that expert testimony defining the standard of care was required.<sup>187</sup> The court held that "[a] lawyer who admits that he omitted from a will a residuary clause requested by the testator and thereby causes the residual estate to pass by intestate succession has facially demonstrated an obvious lack of care and skill.

178. *Id.*

179. *Id.* at 427.

180. *Reed*, 490 So. 2d at 427.

181. *See id.* at 428.

182. 227 S.E.2d 802 (Ga. Ct. App. 1976).

183. *Id.* at 806.

184. *See, e.g.*, *Lysick v. Walcom*, 65 Cal. Rptr. 406, 419 (Cal. Ct. App. 1968); *Joos v. Auto-Owners Ins. Co.*, 288 N.W.2d 443, 445 (Mich. Ct. App. 1979); *Rizzo v. Haines*, 555 A.2d 58, 66-67 (Pa. 1989).

185. *See McCafferty v. Musat*, 817 P.2d 1039, 1043-44 (Colo. Ct. App. 1990).

186. 519 A.2d 172 (D.C. 1986).

187. *Id.* at 174.

No expert need guide the factfinder here."<sup>188</sup>

On the other hand, in *Wilkinson v. Rives*<sup>189</sup> the court held that expert testimony was required when an attorney, in drafting a homestead exemption, had omitted an optional affidavit that would have given the client the benefit of certain presumptions.<sup>190</sup> The court deemed the applicable standard of care to be beyond the common knowledge of laymen.<sup>191</sup> Additionally, in *Brown v. Gitlin*<sup>192</sup> the court held that expert testimony was required in deciding whether an attorney's failure to record a sale of stock as required by state law was negligence, because there was a question of whether the sale of a business was a transaction covered by the securities laws.<sup>193</sup> However, in *Practical Offset, Inc. v. Davis*<sup>194</sup> the same court suggested that when an attorney's failure to record a financing statement to perfect a security interest disclosed an obvious and undisputed breach of duty, expert testimony would not be required.<sup>195</sup>

Finally, in *Stewart v. Sbarro*<sup>196</sup> the New Jersey Supreme Court held that expert testimony was not necessary to prove malpractice of a seller's attorney who, in the sale of a business, failed to obtain for his clients a properly executed bond and mortgage with the proper recording.<sup>197</sup> The attorney's negligence caused his clients to become unsecured creditors when the business subsequently went bankrupt. The court reached this conclusion by applying the common experience exception.<sup>198</sup>

## VI. SCOPE AND SUFFICIENCY OF EXPERT TESTIMONY

The topic of scope and sufficiency of expert's testimony moves beyond the question of whether an expert is necessary in order to establish a prima facie case. Included points of discussion are the expert's qualifications and the substance of the proposed testimony. The initial question to be addressed is whether the witness is qualified to offer expert testimony. Second, under what circumstances should the court permit the expert witness to testify?

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188. *Id.* at 175.

189. 172 Cal. Rptr. 254 (Cal. Ct. App. 1981).

190. *Id.* at 256.

191. *Id.* at 256-57.

192. 313 N.E.2d 180 (Ill. App. Ct. 1974).

193. *Id.* at 182-83.

194. 404 N.E.2d 516 (Ill. App. Ct. 1980).

195. *Id.* at 523. However, in this case, expert testimony was submitted by the plaintiff in the form of an expert's affidavit. *Id.*

196. 362 A.2d 581 (N.J. Super. Ct. App. Div.) (per curiam), *cert. denied*, 371 A.2d 63 (N.J. 1976).

197. *Id.* at 587.

198. *Id.*

*A. Qualifications of the Expert Witness**1. General*

The question of the sufficiency of the expert's qualifications is initially a matter of law for the court and is further a matter of discretion.<sup>199</sup> Once an expert has been qualified, inexperience that detracts from the expert's qualifications becomes a matter of weight as opposed to admissibility.<sup>200</sup> These general rules govern expert witnesses in all types of cases.

The issues regarding qualifications of experts in legal malpractice cases are complicated by the fact that the practice of law has become highly specialized, particularly in urban areas. Although only a few legal areas are recognized as specialties, many lawyers limit their practices to one or two selected areas, such as personal injury, workers compensation, real estate law, and family law, among others. Additionally, some of these specialties have sub-specialties. To practice in the highly technical areas such as medical malpractice and securities regulation, practitioners must possess highly developed skills and knowledge. Yet, any general practitioner who has a license may attempt to practice in any of these specialized areas.

Another complicating factor is locality. Each jurisdiction licenses attorneys, but many attorneys practice across state lines. Even within a single jurisdiction, the question of comparing a practice in an urban area to one in a rural area raises questions about the qualifications of expert witnesses.

One of the more recent cases to examine the question of qualifications in some depth is *Jeffer, Mangels & Butler v. Glickman*.<sup>201</sup> In *Jeffer* the attorneys were employed to assist in the takeover of an application for a savings and loan association charter, a complicated and risky venture that ultimately failed because the parties were unable to obtain a certificate from the federal regulators.<sup>202</sup> The attorneys sued for their fees, and the defendant cross-claimed for malpractice based upon a failure to warn of the risk involved.<sup>203</sup> The defendants offered an expert witness who had extensive experience with savings and loan laws. The expert's firm had filed applications for savings and loans that were approved at the state level, but not at the federal level. The witness testified that he was familiar with the rules and that he had an ongoing acquaintance with the regulators. However, the witness had not actually carried an application through to conclusion and obtained

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199. See 2 MALLEN & SMITH, *supra* note 5, § 27.17, at 681.

200. *Jeffer, Mangels & Butler v. Glickman*, 286 Cal. Rptr. 243, 250 (Ct. App. 1991) (citing *Brown v. Colm*, 522 P.2d 688 (Ca. 1974)).

201. 286 Cal. Rptr. 243 (Ct. App. 1991).

202. *Id.* at 244-45.

203. *Id.* at 244.

approval with a certificate being issued.<sup>204</sup> The trial court stated "I think anyone who has not carried an application through to completion with the issuance of a certificate and insurance is not qualified."<sup>205</sup> Without the expert testimony, the defendant's cross-claim was nonsuited.<sup>206</sup>

On appeal, the court reversed and found as follows:

a. "A person is qualified to testify as an expert if he or she has special knowledge, skill, experience, training, or education sufficient to qualify him or her as an expert on the subject to which the testimony relates."<sup>207</sup>

b. A broad standard of qualification is as appropriate in legal malpractice cases as it is in medical malpractice cases because an overly strict rule may make it impossible to secure a qualified expert witness.<sup>208</sup>

c. It is not necessary that expert witnesses actually have performed the same or exact function about which they propose to testify if the witness otherwise has experience, training, or knowledge of the area at issue.<sup>209</sup>

d. The party offering the expert must demonstrate that the expert's knowledge is sufficient. Whether such demonstration has sufficiently been made is a determination left to the discretion of the trial judge.<sup>210</sup>

e. If the witness is otherwise qualified, the witness's inexperience goes to the weight and not admissibility of the testimony.<sup>211</sup>

In *Cleckner v. Dale*<sup>212</sup> plaintiffs sought to introduce expert testimony concerning the standard of care for lawyers representing clients in real estate closings and whether the defendant attorney's conduct met that standard.<sup>213</sup> The trial court declined to admit the evidence because it intended to provide detailed instructions to the jury.<sup>214</sup> The appellate court reversed.<sup>215</sup> The court recognized that "the standard of care applicable to a particular case will vary depending on the type of legal activity involved."<sup>216</sup> For instance, the standard applicable to civil litigators could be different from those for a real estate lawyer.<sup>217</sup> The court observed "[t]he varied nature of the practice of law underscores the necessity of expert proof intended to acquaint the finder

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204. *Id.* at 245.

205. *Id.* (quoting the trial court's opinion).

206. *See Glickman*, 286 Cal. Rptr. at 245.

207. *Id.* at 246 (quoting CAL. EVID. CODE § 720(a) (West 1966)).

208. *Id.* at 246-47.

209. *Id.* at 247-48.

210. *Id.* at 249.

211. *Glickman*, 286 Cal. Rptr. at 249 (citing *Brown v. Colm*, 522 P.2d 688 (Ca. 1974)).

212. 719 S.W.2d 535 (Tenn. Ct. App. 1986).

213. *Id.* at 539.

214. *Id.*

215. *Id.* at 543.

216. *Id.* at 540 n.4.

217. *Cleckner*, 719 S.W.2d at 540 n.4.

of fact with the applicable professional standard in each case.”<sup>218</sup> Although qualification was not directly in issue in *Cleckner*, the case recognizes that an expert’s qualifications should relate to the particular practice involved. To hold otherwise is to invite outcome-oriented testimony.

Two Washington cases illustrate issues regarding qualifications of expert witnesses. In *Walker v. Bangs*<sup>219</sup> the plaintiff alleged negligence by his former attorney in handling a longshoreman’s maritime personal injury claim.<sup>220</sup> The court noted that a person who holds himself out as a specialist or as possessing greater than ordinary knowledge in a field would be held to the standard of a specialist in that area.<sup>221</sup> Further, the court refused to find an otherwise qualified expert witness to be unqualified for the sole reason that he was not a member of the local bar.<sup>222</sup> Instead, the court focused on the experience of the plaintiff’s witness, who had prepared and tried similar cases. The expert’s personal participation in similar litigation was sufficient to qualify the witness. Therefore, the court found that the trial court erred in excluding the expert’s testimony simply because he was not licensed in Washington.<sup>223</sup>

Subsequently, in *Hizey v. Carpenter*<sup>224</sup> the court rejected the contention that the defendant should be held to a higher standard than ordinary care because he held himself out as a “specialist” in real estate law.<sup>225</sup> The court stated that there was no recognized “real estate specialist” standard of care and further held that the language in *Walker* regarding specialists was dictum.<sup>226</sup> Finally, the court noted that the jury was correctly charged with the standard of “a reasonably prudent lawyer . . . in the same or similar circumstances.”<sup>227</sup> Because the court did not overrule *Walker* but rather limited it, presumably, an analogy can be made between the standard of care and an expert witness’s qualifications.<sup>228</sup>

Therefore, the question of qualifications is initially whether the witness’s training and experience enables the witness to establish the applicable standard for the defendant attorney in the underlying case. If a defendant attorney practices in a specialized area, then the expert must be qualified in that same area.<sup>229</sup> For example, in *Wright v. Williams*<sup>230</sup> a malpractice action involv-

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218. *Id.*

219. 601 P.2d 1279 (Wash. 1979) (en banc).

220. *Id.* at 1281.

221. *Id.* at 1283.

222. *Id.* at 1282.

223. *Id.* (noting that nonadmittance to the local bar should go to the weight, not the admissibility, of the expert’s testimony).

224. 830 P.2d 646 (Wash. 1992) (en banc).

225. *Id.* at 655.

226. *Id.*

227. *Id.*

228. *See id.*

229. *See supra* notes 27-28 and accompanying text.

ing an attorney who held himself out as a specialist, the California Court of Appeals held that only an attorney knowledgeable about the particular specialty can qualify to define the standard of care and opine whether it was met.<sup>231</sup>

## 2. *Geographical Considerations - The Locality Rule*

In measuring the skill, diligence, and practice of an attorney, some courts have taken into consideration the locality or community in which the attorney practices as an element in determining the applicable standard of care. This consideration is one of much disagreement and debate.<sup>232</sup> Various courts have held that the locality may be the community, the county, or the state.<sup>233</sup> In areas of federal law, it had been argued that the requisite standard of care should be a national one.<sup>234</sup>

The locality rule has been eroded to a large degree in medical malpractice cases. Therefore, arguments have been made that it likewise should not be applied in legal malpractice cases. Basically, the prevailing arguments are as follows: First, the rule is an inappropriate anachronism considering modern educational standards and communication. Second, the rule serves to protect pockets of incompetence.<sup>235</sup> However, the legal profession is different from the medical profession. Legal practice is affected by local customs and attitudes, as is evidenced by the practice of associating local counsel in many cases.

The application of a locality rule may affect the qualification of an expert witness. In *Cook v. Irion*<sup>236</sup> the plaintiff's expert was admitted in Texas, but practiced in a different county than the defendant attorney.<sup>237</sup> The issue was whether the defendant attorney was negligent in failing to join other parties as defendants in the plaintiff's personal injury case.<sup>238</sup> The trial court permitted

230. 121 Cal. Rptr. 194 (Ct. App. 1975).

231. *Id.* at 200.

232. See generally Fagerlund, *supra* note 12 (discussing the locality rule and its relation to the standard of care); John R. Skelton, Note, *The Locality Rule in Legal Malpractice Litigation: An Inappropriate Method of Defining the Required Standard of Care*, 9 W. NEW ENG. LAW REV. 395 (1986).

233. Fagerlund, *supra* note 12, at 678.

234. See *Walker v. Bangs*, 601 P.2d 1279, 1282-83 (Wash. 1979) (en banc). The court did not address plaintiff's argument for a national standard of practice for a trial specialist. *Id.* at 1283.

235. *Russo v. Griffin*, 510 A.2d 436, 437-38 (Vt. 1986) (citing *Skilkret v. Annapolis Emergency Hospital Assoc.*, 349 A.2d 245, 248 (Md. 1978)).

236. 409 S.W.2d 475 (Tex. Civ. App. 1966), *overruled in part by Cosgrove v. Grimes*, 774 S.W.2d 662, 665 (Tex. 1989) (disapproving an exception to attorney negligence based on the attorney's subjective good faith).

237. *Id.* at 477.

238. *Id.* at 476.



the expert to testify that the defendant had not practiced to the standards of a general practitioner in the state of Texas.<sup>239</sup> The court of appeals reversed, holding that the case involved the exercise of judgment in light of local conditions and that the expert, who had not tried a case in the county in question, was not qualified.<sup>240</sup> The court stated:

[A]n attorney practicing in a vastly different locality would not be qualified to second-guess the judgment of an experienced attorney of the El Paso County Bar as to who should be joined as additional party defendants. . . . [T]he probable make-up of the jury panel is an important consideration of whom to sue where there is an option. The importance of knowledge of the local situation is fully demonstrated by the well-recognized practice among the lawyers of this State in associating local counsel in the trial of most important jury cases.<sup>241</sup>

The Vermont Supreme Court criticized the locality rule in *Russo v. Griffin*.<sup>242</sup> In *Russo* the attorney who prepared the necessary documents for his client to buy out a shareholder was sued for failing to include a covenant not to compete.<sup>243</sup> Two of defendant's experts testified that the defendant attorney had complied with the local standard of practice in Rutland, Vermont. However, the plaintiff offered expert testimony that defendant's conduct did not comport with standards for the state of Vermont. The trial court accepted the testimony of the defendant's experts.<sup>244</sup> On appeal, the court reversed, holding that the applicable standard of care should not be that of a community, stating:

The shortcomings of the locality rule are well recognized. It immunizes persons who are sole practitioners in their community from malpractice liability and it promotes a "conspiracy of silence" in the plaintiffs' locality which, in many cases, effectively precludes plaintiffs from retaining qualified experts to testify on their behalf.<sup>245</sup>

Despite this criticism, the court did not entirely abandon the geographical consideration. It held that the relevant geographical area was not the community where the attorney works or the nation as a whole, but rather the

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239. *Id.* at 477.

240. *Id.*

241. *Cook*, 409 S.W.2d at 478.

242. 510 A.2d 436 (Vt. 1986).

243. *Id.* at 437.

244. *Id.*

245. *Id.* at 437-38 (citing *Skilkret v. Annapolis Emergency Hospital Assoc.*, 349 A.2d 245, 249 (Md. 1975)).

jurisdiction in which the attorney was licensed to practice.<sup>246</sup>

In several Georgia cases, the courts expressly recognized the need for expert testimony concerning a general standard of care by all members of the legal profession rather than a standard for a specific geographic location.<sup>247</sup> For example, in *Kellos v. Sawilowsky*<sup>248</sup> the court even rejected testimony about the standard of care applicable to the State of Georgia and affirmed a summary judgment based on the absence of any testimony concerning the more broad standard of generally accepted professional legal conduct.<sup>249</sup>

### 3. The Judge As an Expert

In a number of cases, one of the parties may call an active judge as a witness, including the trial judge in the underlying action.<sup>250</sup> However, Mallen and Smith are highly critical of this practice:

Public policy and ethical considerations militate against the trial judge testifying as an expert witness in litigation involving parties who previously appeared before him. Ethical mandates governing judicial conduct dictate that a judge should not create the appearance of impropriety. Opinion testimony by a judge creates the appearance of partiality on behalf of a litigant, is greatly prejudicial to the adverse party, and raises the suspicion of judicial favoritism in the prior litigation.<sup>251</sup>

The Wisconsin Supreme Court expressed similar concerns in *Helmbrecht v. St. Paul Insurance Co.*<sup>252</sup> In that case, one of the parties called the trial judge in the original divorce action to testify about the fairness of a divorce settlement and what the outcome of the case would have been if the parties had gone to trial.<sup>253</sup> The supreme court criticized the practice of calling the trial judge as a witness and held that the problem could be and should be avoided by using an objective standard of what a reasonable trial judge would have done, rather than the more subjective standard of what the particular judge handling the case would have done.<sup>254</sup> Further, given the potential for unfair

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246. *Id.* at 438.

247. *Kellos v. Sawilowsky*, 322 S.E.2d 897, 898 (Ga. Ct. App. 1984), *aff'd*, 325 S.E.2d 757 (Ga. 1985); *Storrs v. Wills*, 316 S.E.2d 758, 760 (Ga. Ct. App. 1984); *Gibson v. Talley*, 275 S.E.2d 154, 156 (Ga. Ct. App. 1980).

248. 322 S.E.2d 897 (Ga. Ct. App. 1984), *aff'd*, 325 S.E.2d 757 (Ga. 1985).

249. *Id.* at 898.

250. 2 MALLEN & SMITH, *supra* note 5, § 27.17, at 683.

251. *Id.* at 683 (citations omitted).

252. 362 N.W.2d 118 (Wis. 1985).

253. *Id.* at 123.

254. *Id.* at 124-25.

prejudice, the court held it was an error to allow the trial judge to testify as an expert witness in a malpractice case.<sup>255</sup>

#### 4. *The Respective Roles of the Trial Judge and the Expert Witness*

##### i. *Testimony about the Law*

Confusion results in many legal malpractice cases concerning the respective roles of the trial judge and the expert witness for several reasons. First, the lawyer's conduct is measured by a standard of care that will be influenced by the lawyer's perception of the law and the perception of the reasonably prudent lawyer against which one measures the defendant attorney's conduct. The trial judge is obligated to define the legal duties owed by the lawyer, but generally the judge may not substitute his or her own perceptions of what the law is as an expert.<sup>256</sup> Therefore, because it is the trial judge's function to instruct the jury on the law, an expert should not testify about the law or offer any legal conclusions.<sup>257</sup>

In many cases, litigants can avoid the problem by having the expert describe the standard of care in terms of what lawyers do in their practice rather than referring to any perceived legal requirement or duty. The trial court, on the other hand, will instruct the jury on the legal duties arising from the general law of negligence and the specific duties owed by lawyers by reference to statutes, rules, and case law. For example, in any case involving the alleged failure to properly investigate and try a medical malpractice case, the expert would testify about how the community of lawyers handle such cases. The expert's testimony will cover, among other things, how a lawyer in the community would generally conduct an investigation, what types of persons they would consult and interview, how a theory of liability is developed, and what witnesses would normally be called at trial. Then, the trial judge's instructions to the jury would include the law of negligence, the duty of a lawyer to investigate the client's case, and the lawyer's obligations

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255. *Id.* at 126.

256. *Bonhiver v. Rotenberg, Schwartzman & Richards*, 461 F.2d 925, 928-29 (7th Cir. 1972) (citing *People v. Wallenberg*, 181 N.E.2d 143, 145 (Ill. 1962)); see *supra* notes 21-26 and accompanying text.

257. *Adalman v. Baker, Watts & Co.*, 807 F.2d 359, 368 (4th Cir. 1986) (citing *Marx & Co. v. Diners' Club, Inc.*, 550 F.2d 505 (2d. Cir.), *cert. denied*, 434 U.S. 861 (1977)); *Practical Offset, Inc. v. Davis*, 404 N.E.2d 516, 521 (Ill. App. Ct. 1980) (noting the impropriety of conclusions of law in expert's affidavit); *Hacker v. Holland*, 570 N.E.2d 951, 953 (Ind. Ct. App. 1991) (holding experts may not offer testimony regarding conclusions of law) (citing *Rhine v. Haley*, 378 S.W.2d 655, 662 (Ark. 1964)); *Chocktoot v. Smith*, 571 P.2d 1255, 1257 (Or. 1977) (en banc) (noting expert testimony should not invade the province of the jury) (citing *Shields v. Campbell*, 559 P.2d 1275 (Or. 1977)).

to practice according to the prevailing standards of other lawyers in the area.<sup>258</sup> In areas where the law is unclear or uncertain, the attorney's perception of the law, as well as that of the legal community, may be important.<sup>259</sup>

Nevertheless, the issue remains *how* lawyers conduct themselves in a particular situation and *not* the state of the law at the time. The issue of what the law was at the time is one for the court. On the other hand, the issue of how lawyers conducted themselves in light of the prevailing situation is one for the expert.<sup>260</sup> This was the main issue in *Cianbro Corp. v. Jeffcoat & Martin*.<sup>261</sup> In *Cianbro*, the attorney was mistaken in his view of the law regarding the length of time within which to file an action to enforce a mechanic's lien.<sup>262</sup> However, the question was not what the law actually was, but what the practice of attorneys in filing mechanic's liens was at the time and whether the defendant deviated from that standard.<sup>263</sup> The actual requirement of the statute and the status of the law at the time was a question for the court. The question of what attorneys actually did was a question of fact on which expert testimony was required.<sup>264</sup>

#### *a. Mixed Questions of Law and Fact*

In some cases, the separation of the standard of practice and the state of the law is difficult in that they are so interwoven that they present mixed questions of law and fact. For example, in a complex tax case, the complexity of the law and the defendant attorney's conduct can be so interwoven that an expert may not be able to explain the requisite standard of care without also explaining the intricacies of the law. In cases with mixed questions of law and fact, commentators have suggested that the trial judge should first hear the testimony outside the presence of the jury to determine whether the expert's legal premises are compatible with the anticipated jury instructions and then admit only that part of the testimony that the court finds to be in harmony with its view of the law.<sup>265</sup>

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258. See *Quality Inns Int'l v. Booth, Fish, Simpson, Harrison, & Hall*, 292 S.E.2d 755, 762-63 (N.C. Ct. App. 1982).

259. See *supra* notes 154-170 and accompanying text.

260. 2 MALLEN & SMITH, *supra* note 5, § 27.16, at 678-79.

261. 804 F. Supp. 784 (D.S.C. 1992), *aff'd*, 10 F.3d 806 (4th Cir. 1993) (mem.).

262. *Id.* at 787-88.

263. *Id.* at 792.

264. See *id.* at 791-92 (citing *Berman v. Rubin*, 227 S.E.2d 802, 806 (Ga. Ct. App. 1976)).

265. Baker, *supra* note 4, at 343; *Expert Legal Testimony*, *supra* note 4, at 811-13 (stating that conflicting expert legal testimony not in conformity with the judge's formulation should be excluded).

*b. Legal Conclusions*

Sometimes testimony is offered that requires the witness to not only make a statement of the law or to assume the current status of the law as a part of his answer, but also to draw a conclusion based on the facts and the issues of a particular case. As suggested above, attorneys can often avoid this dilemma in malpractice cases by framing the question so that the witness testifies about what lawyers do, rather than what their legal obligations to the client are. The importance of framing questions so that legal conclusions are avoided is recognized in Rule 704 of the Federal Rules of Evidence.<sup>266</sup> The advisory committee comment's note the following:

Thus the question, "Did T have capacity to make a will?" would be excluded, while the question, "Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?" would be allowed.<sup>267</sup>

A recent North Carolina case, *Smith v. Childs*,<sup>268</sup> describes the general rules applicable to expert testimony and legal conclusions.<sup>269</sup> In *Smith* the trial court allowed an attorney expert to give testimony on the legal interpretation of a contract term.<sup>270</sup> The appellate court held that this testimony was admitted in error because "[a]n expert is not allowed to testify that a particular legal standard, or legal term of art, has been met."<sup>271</sup> The court further stated that

[w]hen the expert witness is *an expert legal witness*, the avoidance of testimony regarding legal conclusions can be problematical since attorneys deal with legal terms of art on a daily basis. However, while an expert may testify to the existence of the factual components, he may not testify as to the legal conclusions; such testimony invades the court's province to determine the applicable law and to instruct the jury on that law.<sup>272</sup>

Two Oregon cases further demonstrate the difficult problem of separating

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266. See FED. R. EVID. 704 advisory committee's note.

267. *Id.* (citing MCCORMICK ON EVIDENCE, § 12 (John W. Strong ed., 4th ed. 1992)).

268. 437 S.E.2d 500 (N.C. Ct. App. 1993).

269. *Id.* at 505-07.

270. *Id.* at 506-507.

271. *Id.* at 506 (citing *HAJMM Co. v. House of Raeford Farms, Inc.*, 403 S.E.2d 483, 488 (N.C. 1991)).

272. *Id.* (citing *HAJMM*, 403 S.E.2d at 488-89).

the legal and factual issues. In the first case, *Shields v. Campbell*,<sup>273</sup> the plaintiff sued her attorney for negligence in representing her in a formal litigation involving the ownership of a bank account in the joint name of the plaintiff and her deceased son.<sup>274</sup> The trial court found the estate of the son owned the account.<sup>275</sup> The plaintiff appealed from an adverse judgment asserting as error the allowance of expert testimony on the ultimate issue.<sup>276</sup> The trial court allowed two experts to testify about their interpretation of two other Oregon Supreme Court decisions relative to bank account ownership. The court noted that the plaintiff also called experts who testified that the defendant attorney had not met the standard of care by his failing to offer into evidence certain documents relevant to the ownership of the bank accounts.<sup>277</sup> The plaintiff's experts opined that if such documents had been offered, under Oregon law, the plaintiff would have prevailed in the underlying case.<sup>278</sup>

The court also noted that the plaintiff had not objected to the defendant's experts' testimony and held that opinion evidence about an ultimate issue was not improper.<sup>279</sup> The court stated that "[W]e know of no other way in which the jury could have been guided in determining the issue than the presentation of opinion by properly qualified experts."<sup>280</sup>

Unfortunately, the court in *Shields* failed to recognize the distinction between questions of law and question of fact. The plaintiff's failure to object to the testimony of the defendant's experts at trial clouds the case, and the opinion reflects the court's confusion in attempting to separate the legal and factual issues.

In the second Oregon case, *Chocktoot v. Smith*,<sup>281</sup> the supreme court was again faced with a legal malpractice case involving alleged negligence in a probate litigation.<sup>282</sup> The trial court held that because a judge tried the underlying case, it was for the court — and not a jury — to decide how the former trial would have resulted absent the alleged malpractice.<sup>283</sup> On appeal, the court examined in depth the functions of the judge and jury in legal malpractice actions.<sup>284</sup> The court noted that in *Shields*, testimony concerning

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273. 559 P.2d 1275 (Or. 1977) (en banc).

274. *Id.* at 1277.

275. *Id.*

276. *Id.* at 1278.

277. *Id.* at 1278-79.

278. *Shields*, 559 P.2d at 1279.

279. *Id.* at 1279-80.

280. *Id.* at 1280.

281. 571 P.2d 1255 (Or. 1977) (en banc).

282. *Id.* at 1256-57.

283. *Id.* at 1257.

284. *Id.* at 1257-59.

the law and legal conclusions had been admitted without objection and held that "the jury cannot decide a disputed issue of law on the testimony of lawyers."<sup>285</sup> The court went on to hold that the legal consequences of what the attorney did or failed to do were matters of argument and not of proof and were in the first instance to be decided by the court.<sup>286</sup> The court held:

The question what decision should have followed in the earlier case if the defendant attorneys had taken proper legal steps is a question of law for the court. Consequently, such legal rulings are also open for briefing and review on appeal.

The question what outcome should have followed if defendants had conducted a proper investigation, presentation (or exclusion) of evidence, or other steps bearing on a decision based on facts remains a question of fact for the jury. . . . If the alleged negligence of an attorney in an earlier case involved both legal and factual elements, it would be necessary for the trial court to separate these elements and to instruct the jury accordingly.<sup>287</sup>

The court concluded that under this standard, it made no difference whether the prior trial was by a judge or jury. The division of functions in the subsequent legal malpractice trial should remain the same, and it was error for the trial court to deny a jury trial.<sup>288</sup>

When applying the *Chocktoot* analysis to the propriety of the proffered expert testimony, the key element is the distinction between argument and evidence. When the expert ventures beyond what lawyers do and how they practice, the expert is impinging on the trial court's function to declare the law, and the expert's role shifts from that of a witness to that of an advocate. Judge Learned Hand succinctly stated the wisdom of not allowing this transition from witness to advocate: "Argument is argument whether in the box or at the bar, and its proper place is the last."<sup>289</sup>

## ii. *Proximate Cause and Damages*

When an expert's testimony ventures beyond establishing the requisite standard of care, three problems arise. First, the testimony often enters the realm of legal conclusions, and such testimony invades the province of the court. Second, the opinion may be speculative and unnecessarily invade the

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285. *Id.* at 1258.

286. *Chocktoot*, 571 P.2d at 1259.

287. *Id.*

288. *Id.*

289. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 123 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

province of the jury. Lastly, there is the philosophical question of the "case within the case" concept and how it should be applied in a legal malpractice setting should be considered.

The Court of Appeals of Washington addressed all three of the above concerns in *Halvorsen v. Ferguson*,<sup>290</sup> in which the alleged malpractice was the wife's attorney's failure to obtain an adequate interest in the value of certain corporations and their subsidiaries owned by her husband.<sup>291</sup> The plaintiff's experts theorized that the wife's attorney had breached his duty by failing to research adequately and advance appropriate legal theories in the underlying action.<sup>292</sup> Therefore, the expert opined that absent the attorney's alleged malpractice, the trial judge would have found the husband's interests in the various corporations to be community property.<sup>293</sup>

The court noted that legal malpractice cases involve mixed questions of law and fact.<sup>294</sup> The question of whether an attorney erred was one of law, but if there was an error, the question of whether the error was caused by the attorney's negligence was one of fact.<sup>295</sup> Thus, the expert's opinion that an attorney erred was irrelevant and could be ignored, but the question of causation was one of fact.<sup>296</sup>

The evidence in the malpractice action was that the attorney had presented evidence in the prior marriage dissolution action to support the theories asserted by the experts, but the issue simply had been resolved adversely.<sup>297</sup> Thus, the opinion of the plaintiff's expert that a "highly favorable result"<sup>298</sup> would have occurred in the underlying action amounted to nothing more than speculation.<sup>299</sup> As a result, the plaintiff's expert testimony was legally insufficient. The court clearly based its analysis on the plaintiff's failure not only to prove a deviation from the standard of care, but also to prove proximate cause by creating an issue of fact regarding the effect of the alleged negligence in the underlying action.<sup>300</sup>

The case within the case concept and its relationship to expert testimony

290. 735 P.2d 675 (Wash. Ct. App. 1986).

291. *Id.* at 677.

292. The malpractice claim related to the tactical decisions made by the attorney in that the plaintiff alleged that the attorney had failed to sufficiently emphasize a theory that all the parties agreed was not supported by any law in that jurisdiction. *Id.* at 680.

293. *Id.* at 678.

294. *Id.*

295. *Halvorsen*, 735 P.2d at 678-79 (citing R. MALLIN & V. LEVIT, *LEGAL MALPRACTICE* § 659, at 820-21 (2d ed. 1981)).

296. *See id.*

297. *Id.* at 677.

298. *Id.* at 683.

299. *Id.*

300. *Halvorsen*, 735 P.2d at 683.



was the subject of discussion in *Helmbrecht v. St. Paul Insurance Co.*<sup>301</sup> This malpractice action also resulted from a divorce proceeding.<sup>302</sup> At the malpractice trial, the trial judge in the original divorce action testified about the settlement's fairness and also about how he would have ruled if the case had been tried.<sup>303</sup> The Wisconsin Supreme Court held this testimony to be improper.<sup>304</sup>

Under the case-within-a-case concept, the test is objective.<sup>305</sup> Therefore, the test is not what the outcome *would have been*, but rather what it *should have been*. This is true whether the original trier of fact was a judge or jury. The accepted method of trying the case within the case is to prove what should have been proven in the underlying case. The judge in the malpractice case decides the issues of law, and the jury decides the issues of fact.<sup>306</sup>

When the attorney's conduct does not involve the destruction of an underlying claimant's case, the case within the case concept may not apply, but there still must be proof of a causal connection between the attorney's conduct and the alleged damages.<sup>307</sup> Expert testimony requirements will remain essentially the same.<sup>308</sup>

Additionally, some courts recognize that even in the case within the case context, expert opinion testimony may be admissible to aid in determining the reasonableness of the settlement the defendant attorney reached in the underlying case.<sup>309</sup> Therefore, the plaintiff's case is not entirely dependent on the outcome of the case within the case.

### *B. Sufficiency of the Expert Testimony*

In legal malpractice cases requiring expert testimony, the ultimate question the practitioner faces is whether the proposed expert testimony will be legally sufficient to establish a *prima facie* case. As such, the sufficiency question is a common thread in cases discussing expert witness testimony in the area of legal malpractice.

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301. 362 N.W.2d 118 (Wis. 1985).

302. *Id.* at 121.

303. *Id.* at 123.

304. *Id.* at 126.

305. *See id.* at 125.

306. *Helmbrecht*, 362 N.W.2d at 126.

307. *See Fiedler v. Adams*, 466 N.W.2d 39, 42 (Minn. Ct. App. 1991).

308. *See Nelson v. Taoka*, 611 N.E.2d 462, 466-67 (Ohio Ct. App. 1992), *jurisdictional motion overruled by* 605 N.E.2d 393 (Ohio 1993); *Mali v. Odom*, 295 S.C. 78, 81-82, 367 S.E.2d 166, 168-69 (Ct. App. 1988).

309. *Fishman v. Brooks*, 487 N.E.2d 1377, 1380 (Mass. 1986).

### 1. Sufficiency and the Ethical Rules

When the expert proposes to testify to a standard of care based solely upon the Rules of Professional Conduct, there is a serious risk of the testimony being held insufficient. In *Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C.*<sup>310</sup> the plaintiff recovered a substantial verdict against the defendant attorneys based upon an alleged conflict of interest in representing multiple parties in a business transaction.<sup>311</sup> In the malpractice trial, one of the plaintiff's two experts was a professor who based his testimony of the applicable standard of care on the Model Rules of Professional Conduct. However, he was not asked whether he was familiar with the standards for practice of corporate law in the area.<sup>312</sup> The other expert was a practicing attorney who acknowledged that he was not familiar with the standard of corporate practice in the area. Furthermore, he stated that he could not differentiate between Ethical Considerations and Disciplinary Rules.<sup>313</sup> The court commented on the impropriety of using the Model Code of Professional Responsibility as the applicable standard of lawyers practicing in the area by stating:

Since the Code does not set the standard of care upon which an action for negligence can be based, expert testimony that a lawyer violated provisions of the Code is not sufficient evidence to present an issue of fact for the jury. Such testimony is not evidence of the degree of knowledge, skill, prudence, and diligence which is commonly possessed and exercised by lawyers practicing with regard to the same subject matter in that jurisdiction.<sup>314</sup>

On appeal, the Tennessee Supreme Court affirmed the court of appeals' granting of a directed verdict by holding that this testimony was insufficient as a matter of law because the conduct of lawyers as they actually practiced controlled the standard of care in a civil setting and not the Model Code of Professional Conduct.<sup>315</sup>

While the Rules of Professional Conduct provide guidance, standing alone, the Rules do not establish the standard. *Lazy Seven* represents a view a number of courts follow, although others disagree.<sup>316</sup> The party offering

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310. 813 S.W.2d 400 (Tenn. 1991).

311. *Id.* at 403.

312. *Id.* at 406.

313. *Id.*

314. *Id.* at 407.

315. *Seven Coals Sales, Inc.*, 813 S.W.2d at 407.

316. See generally *Fishman v. Brooks*, 487 N.E.2d 1377, 1381 (Mass. 1986) (noting that while a violation of a canon of ethics or a disciplinary rule, is not of itself negligence, if the rule was a protective rule, then it may be some evidence of an attorney's negligence); *Hooper v.*

the expert can avoid the problem by choosing an expert who is qualified to testify about what actually happens in practice as well as, or in addition to, the effect of the Rules of Professional Conduct on the standards of practice.

## 2. *The Reasonably Prudent Lawyer*

The appropriate standard of care the attorney must comport to is that of a reasonably prudent lawyer practicing in the same area. Thus, testimony by an expert that the expert would have performed differently, standing alone, is legally insufficient to carry an action for legal malpractice.<sup>317</sup>

One must be careful to avoid other pitfalls when attempting to establish this appropriate standard. A bald assertion that the attorney has met the standard of care without reference to the supporting facts is likewise insufficient.<sup>318</sup> Additionally, testimony that opines only to possibilities is considered speculative and is thus held to be insufficient.<sup>319</sup> Finally, testimony based on interpretations and conclusions of the law rather than the manner in which attorneys perform their duties is also likely to be found inadmissible and insufficient.<sup>320</sup>

## VII. CONCLUSION

In all but the most obvious cases expert testimony is necessary in legal malpractice cases that involve questions of fact. Even when the case appears to be controlled by a question of law, prudence dictates that an expert be held in reserve to testify and prepared if necessary. The practitioner must prepare the testimony so that it is presented in a way to avoid the various pitfalls. On the other hand, the courts must recognize that parties tend to retain experts whose testimony will support their case. There is a serious risk of unfairness and a breakdown of the adversary system if the court does not make a distinction between arguments and evidence and to restrict an expert's opinions on purely legal issues. The court, not the expert, should determine the law of

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Gill, 557 A.2d 1349, 1352-53 (Md. Ct. Spec. App.) (noting the three approaches taken by various jurisdictions on the effect of an attorney's breach of the Model Rules of Professional Conduct, yet declining to decide which approach Maryland will take), *cert. denied*, 564 A.2d 1182 (Md. 1989), *cert. denied*, 496 U.S. 906 (1990).

317. *Martinson Bros. v. Hjellum*, 359 N.W.2d 865, 874-75 (N.D. 1985) (citing *York v. Stiefel*, 440 N.E.2d 440, 446-47 (Ill. App. Ct. 1982), *aff'd in part, rev'd in part on other grounds by* 458 N.W.2d 488 (Ill. 1983)); *Halvorsen v. Ferguson*, 735 P.2d 675, 681 (Wash. Ct. App. 1986) (citing *Rorrer v. Cooke*, 329 S.E.2d 355, 367 (N.C. 1985)).

318. *See, e.g., Practical Offset, Inc. v. Davis*, 404 N.E.2d 516, 522 (Ill. App. Ct. 1980).

319. *Nelson v. Taoka*, 611 N.E.2d 462, 466-67 (Ohio Ct. App. 1992), *jurisdictional motion overruled by* 605 N.E.2d 393 (Ohio 1993).

320. *Practical Offset*, 404 N.E.2d at 521; *Hacker v. Holland*, 570 N.E.2d 951, 953 (Ind. Ct. App. 1991) (citing *Rhine v. Haley*, 378 S.W.2d 655, 662 (Ark. 1964)).

the case.

It is a tribute to the legal system and to lawyers that the law of legal malpractice has developed without a serious problem of “conspiracy of silence” making it difficult or impossible for plaintiffs to obtain experts. The problem appears to be one of finding a qualified expert rather than the absence of an expert. Unfortunately, the incidences of legal malpractice cases appear to be on an upward trend, and the use of expert witnesses in the field undoubtedly will be the subject of continuing interest and development.

